SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 469

HENRY L. DOHERTY & COMPANY, APPELLANT,

vs.

FRANK GOODMAN

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA

INDEX

	Original	Print
Proceedings in Supreme Court of Iowa	1	1
Clerk's certificate (omitted in printing)	1	
Order settling record	2	1
Stipulation as to record	3	1
Petition for appeal and assignments of error	4	2
Bond on appeal (omitted in printing)	7	
Order allowing appeal	16	4
Citation and service (omitted in printing)	19	
Præcipe for transcript of record	20	5
Stipulation as to record	22	7
Order settling record	23	7
Clerk's certificate (omitted in printing)	24	
Abstract of record from District Court of Polk County	25	8
Petition	26	8
Exhibit "B"—Letter, Frank Goodman to Henry L. Doherty & Co., July 15, 1931	27	9
Notice of filing of petition	28	10
Return of service	29	11
Special appearance of defendant	30	11
Stipulation as to certain facts	32	12
Order on special appearance	34	14
Judgment	35	15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 6, 1934.

—5718-C

	Original	Print
Notice of appeal	36	16
Certificate of counsel to abstract	38	16
Assignments of error	37	16
Points and authorities	39	18
Opinion, Evans, J.	41	20
Dissenting opinion, Mitchell, J.	44	22
Dissenting opinion, Kindig, J.	44	23
Judgment	49	26
Statement of points to be relied upon and designation as to printing record	51	26

[fols. a & 1] Clerk's Certificate to transcript of record omitted in printing.

[fol. 2] **IN SUPREME COURT OF IOWA**

No. 42214

FRANK GOODMAN, Plaintiff-Appellee

v.

HENRY L. DOHERTY & COMPANY, Defendant-Appellant.

ORDER SETTLING RECORD—Filed Sept. 27, 1934

It is hereby ordered that the record hereto attached, numbered from page 1 to 51 inclusive, contains all the opinions, orders, records and proceedings in this action that are necessary and material upon the review of such opinion and order by the Supreme Court of the United States, and shall be certified by the Clerk of this Court as such and be by him transmitted to the Clerk of the United States Supreme Court.

Done at Des Moines, Iowa, this 27th day of September, 1934.

[illegible]hard F. Mitchell, Chief Justice of the Supreme Court of Iowa.

[File endorsement omitted.]

[fol. 3] IN SUPREME COURT OF IOWA

[Title omitted]

STIPULATION AS TO RECORD—Filed Sept. 27, 1934

It is hereby stipulated and agreed by the attorneys for the parties that the record hereto attached, numbered from pages 1 to 51 inclusive, contains all the opinions, orders, records and proceedings in this action that are necessary and material upon the review of such opinion and order by the Supreme Court of the United States and may be

certified by the Clerk of the Supreme Court of Iowa as the complete record of such proceedings and shall constitute full compliance with all requirements.

Fred. W. Lehmann, Jr., William B. Hurlburt, Harrison E. Spangler, Attorneys for Appellant.
Joseph I. Brody, Louis A. Parker, Clyde B. Charlton, G. E. Brammer, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 4] [File endorsement omitted]

IN SUPREME COURT OF IOWA

[Title omitted]

PETITION FOR ORDER ALLOWING APPEAL AND APPROVING BOND—Filed Sept. 17, 1934

Comes now defendant-appellant herein, to-wit, Henry L. Doherty, sued herein under the name of Henry L. Doherty & Company and still specially appearing for the sole purpose of attacking the jurisdiction of the court, makes application to the court as follows:

This appellant considering himself aggrieved by the final decision of the Supreme Court of Iowa in this case, hereby asks that an appeal be allowed him to the Supreme Court of the United States, and that all proceedings in this Court, save only such as are necessary to complete said appeal be stayed pending the outcome of such appeal, and that the bond tendered herewith be approved as an appeal bond and as a supersedeas bond and as a bond for costs.

This defendant also files herewith a statement or brief which he will file with the Supreme Court of the United States showing that said court has jurisdiction to entertain this appeal.

Appellant, for grounds of his appeal, makes the following

ASSIGNMENT OF ERRORS

in the record and proceedings and final decision of this case by the Supreme Court of Iowa:

1. The Supreme Court of Iowa erred in holding that service of an original notice upon E. A. King at Des Moines,

Polk County, Iowa, gave the District Court of the State of Iowa, in and for Polk County, personal jurisdiction over the defendant-appellant, Henry L. Doherty, when the undisputed record showed said defendant was an individual [fol. 5] person, a resident and citizen of the State of New York and of the United States, a non-citizen and non-resident of the State of Iowa who had not been within the boundaries of the State of Iowa at any material time, although said Doherty maintained an office in Polk County, Iowa, in which said King was employed as agent of Doherty and the cause of action grew out of the business of said office.

2. The Supreme Court of Iowa erred in not reversing the decision of the trial court which overruled the special appearance of the defendant, Doherty.

3. The Supreme Court of Iowa erred in construing Section 11079 of the 1927 Code of Iowa so as to make it apply to defendants who were individuals, non-citizens and non-residents of Iowa, citizens and residents of other states of the Union and of the United States and who had never been within the boundaries of Iowa.

4. The Supreme Court of Iowa erred in holding that Section 11079 of the 1927 Code of Iowa, so construed, was not repugnant to any provision of the Constitution of the United States and was valid.

5. The Supreme Court of Iowa erred in failing to hold that Section 11079 of the 1927 Code of Iowa, so construed, denied to the citizens of each State, and to this defendant, a citizen of the State of New York, the privileges and immunities of the citizen in the several states, to-wit, the State of Iowa, and was repugnant to Section 2 of Article IV of the Constitution of the United States and therefore invalid.

6. The Supreme Court of Iowa erred in failing to hold that Section 11079 of the 1927 Code of Iowa, so construed, abridged the privileges and immunities of this defendant who was a citizen of the United States and was repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States and therefore invalid.

[fol. 6] 7. The Supreme Court of Iowa erred in failing to hold that Section 11079 of the 1927 Code of Iowa, so con-

strued, deprived this defendant of property without due process of law and was repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States and therefore invalid.

8. The Supreme Court of Iowa erred in that it held that the State of Iowa, by a legislative enactment, could extend the effect of its process beyond its own territorial limits to subject persons and property outside such limits to its judicial decisions.

9. The Supreme Court of Iowa erred when it, in effect, held that the State of Iowa could by any statute or by any form of service, subject the citizen and resident of another state, who had never been in Iowa, to the jurisdiction of Iowa when such citizen did not consent thereto.

For which errors this appellant, Henry L. Doherty, prays said judgment and decree rendered in this case under date of June 23, 1934, be reversed and that judgment be rendered in favor of this defendant-appellant.

Deacon, Sargent & Spangler, Lehmann, Hurlburt & Hossfeld, Attorneys for Defendant-Appellant.

[fols. 7-15] Bond on Appeal for $1,000.00, approved and filed Sept. 17, 1934, omitted in printing.

[fols. 16-18] IN SUPREME COURT OF IOWA

No. 42214

FRANK GOODMAN, Plaintiff-Appellee,

v.

HENRY L. DOHERTY & COMPANY, Defendant-Appellant.

ORDER ALLOWING APPEAL—Filed Sept. 17, 1934

Now on this 17th day of September, A. D., 1934, this matter came on for hearing on the application for an appeal to the Supreme Court of the United States by the defendant-appellant.

It is ordered that said appeal is hereby allowed and that the bond tendered with said application is hereby approved, and that all further proceedings in this court, save only such as are proper to complete the appeal are hereby stayed pending the outcome of such appeal.

Richard F. Mitchell, Chief Justice of the Supreme Court of Iowa.

[File endorsement omitted.]

[fol. 19] Citation in usual form, showing service on Frank Goodman, filed Sept. 17, 1934, omitted in printing.

[fol. 20] [File endorsement omitted]

IN SUPREME COURT OF IOWA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Sept. 17, 1934

To the Honorable B. W. Garrett, Clerk of the Supreme Court of Iowa:

In the certified transcript of the record in the above entitled cause to be made and transmitted to the Supreme Court of the United States pursuant to an order allowing appeal, dated September 17, 1934, signed by the Honorable Richard F. Mitchell, Chief Justice of the Supreme Court of Iowa, kindly incorporate the following:

1. In each case where you incorporate papers filed in your office, show the date they were so filed.

2. The abstract filed by the appellant in your office, which abstract shows the record in the trial court and in this court, including:

(a) The petition of plaintiff
(b) The original notice
(c) The return of service on the original notice
(d) The Special Appearance of the defendant
(e) The stipulation of fact signed by the parties

(f) The order of the trial court overruling the special appearance and giving defendant time to plead;

(g) The judgment of the trial court.

(h) The recitals of the abstract as to service of notice of appeal and the certificate of the attorneys showing proper steps to give the Supreme Court of Iowa jurisdiction on appeal. You may omit the notice of oral argument and the cost certificate.

3. That part of appellant's argument starting on page 4 thereof, entitled "Assignment of Errors," and ending on page 5 thereof.

[fol. 21] 4. That part of appellant's argument starting on page 5 thereof entitled "Points and Authorities" and ending on page 7 thereof.

5. The opinion and order of the Supreme Court of Iowa in this case dated June 23, 1934.

6. The order or record of opinion of the Supreme Court of Iowa in this case dated June 23, 1934.

7. Stipulation settling bill of exceptions and record before Iowa Supreme Court.

8. Order settling bill of exceptions and record before Iowa Supreme Court.

9. The petition for appeal, the assignment of error and prayer for reversal included therein, the statement as to jurisdiction on appeal pursuant to Rule 12 of the United States Supreme Court filed therewith and the Acknowledgment of Service of all the foregoing.

10. The Order allowing appeal staying procedendo and approving bond.

11. Compliance with Rule 12 and acknowledgment of service thereon.

12. The Supersedeas Bond on appeal.

13. The citation and acknowledgment of service thereof.

14. This præcipe for transcript of record.

15. Stipulation settling record.

16. Order settling record.

17. Your own certificate to the record.

18. Will you also certify such other proceedings, if any there be, as may be necessary to enable you to certify that the transcript is a true and complete transcript of the record.

Lehmann, Hurlburt & Hossfeld, Deacon, Sargent & Spangler, Attorneys for Henry L. Doherty & Company.

Due, timely and proper service of the foregoing præcipe and receipt of copy thereof is hereby acknowledged at Des Moines, Polk County, Iowa, this 17th day of September, 1934.

Frank Goodman, by Brammer, Brody, Charlton & Parker, His attorneys.

[fol. 22] IN SUPREME COURT OF IOWA

[Title omitted]

STIPULATION AS TO RECORD—Filed Sept. 27, 1934

It is hereby stipulated and agreed by the attorneys for the parties that the record hereto attached, numbered from pages 22 to 51 inclusive, contains all the records and proceedings in this action up to and including the Opinion and Order of the Supreme Court of Iowa that are necessary and material upon the review of such opinion and order by the Supreme Court of the United States and may be certified by the Clerk of the Supreme Court of Iowa as the complete record of such proceedings and shall constitute full compliance with all requirements.

Fred. W. Lehmann, Jr., William B. Hurlburt, Harrison E. Spangler, Attorneys for Appellant. Joseph I. Brody, Louis A. Parker, Clyde B. Charlton, George E. Brammer, Attorneys for Appellee.

[File endorsement omitted.]

[fol. 23] IN SUPREME COURT OF IOWA

[Title omitted]

ORDER SETTLING RECORD—Filed Sept. 27, 1934

It is hereby ordered, that the record hereto attached numbered from page 22 to 51 inclusive, contains all the records and proceedings in this action up to and including the Opinion and Order of the Supreme Court of Iowa, that are necessary and material upon the review of such opinion and order by the Supreme Court of the United States, and

shall be certified by the Clerk of this Court as such and be by him transmitted to the Clerk of the United States Supreme Court.

Done at Des Moines, Iowa, this 27th day of September, 1934.

Richard F. Mitchell, Chief Justice of the Supreme Court of Iowa.

[File endorsement omitted.]

[fol. 24] Clerk's Certificate to transcript of record omitted in printing.

[fol. 25] RECORD

On the 5th day of July, 1933, the appeal from the judgment of the Polk County District Court was docketed in the Supreme Court of the State of Iowa.

On the 5th day of July, 1933, the appellant, Henry L. Doherty & Company, filed its abstract on such appeal showing as follows:

[fol. 26] IN DISTRICT COURT OF POLK COUNTY

PETITION—Filed July 31, 1931

For cause of action plaintiff states:

That the defendant is a trade name under which one Henry L. Doherty is doing business through his agents and representatives from his office in Des Moines, Iowa.

That on or about September 1st, 1929, an agent and representative of the defendant solicited the plaintiff to purchase fifteen (15) shares of Cities Service Company common stock at $51.50 per share and at that time the plaintiff entered into an agreement to purchase and pay for said stock, a copy of which agreement is marked Exhibit "A" attached hereto and made a part hereof, and pursuant to said agreement plaintiff paid to the defendant on September 1st, 1929, the sum of $112.50 and on October 7, 1929, paid him an additional sum of $55.00.

That said Cities Service Company common stock is a security within the provisions of Section 3 of Chapter 10

of the Session Laws of the 43rd General Assembly of the State of Iowa, being shares of stock in a corporation incorporated under the laws of some state of the United States other than the State of Iowa.

That on September 1st, 1929, the said defendant was engaged in business in the State of Iowa as a dealer or salesman of securities and dealing in securities and transactions not exempt under section 5 of Chapter 10 of the Session Laws of the 43rd General Assembly, and was not registered in the office of the Secretary of State of the State of Iowa, as provided by said Chapter 10 of said Session Laws of the 43rd General Assembly. That on or about July 16, 1931, this plaintiff elected to rescind said transaction and tendered to the defendant any right or thing of value received by him and offered to release and discharge the defendant from any obligations and/or duties owing to him arising under said contract. That said offer was in writing, a copy of which is marked Exhibit "B" [fol. 27] attached hereto and made a part hereof, and said tender has not been acceded to by said defendant and the plaintiff hereby renews and keeps said tender good.

Wherefore, plaintiff prays judgment against the defendant in the sum of $167.50, with interest at 6 per cent per annum from October 7, 1929.

(NOTE: No Exhibit "A" was attached to the Petition.)

EXHIBIT "B" TO PETITION

July 15, 1931.

Henry L. Doherty & Company, 317 Liberty Building, Des Moines, Iowa.

GENTLEMEN:

On September 1st, 1929, I agreed to purchase from you 15 shares of Cities Service Company Common Stock at $51.50 per share, a total of $772.50, on which I paid you on the 1st day of September, 1929, $112.50 and on October 7, 1929, an additional $55.00.

I do not care to go on with my purchase and I elected to rescind the same and demand cancellation of my note or contract and the return to me of the moneys paid with legal

interest, and I offer to return any right or thing of value received by me and to release and discharge you of any obligations and/or duties to me arising under said contract.

If this rescission is not acceded to by you, I shall begin action to enforce my rights, as I am advised that you had no authority to sell or offer for sale the above stock at the time of the transaction with me, and furthermore I was induced to purchase said stock as a result of fraudulent representation made to me by your agents.

Yours very truly, Frank Goodman, by Brammer, Brody, Charlton & Parker, His Attorneys.

[fol. 28] In District Court of Polk County

Notice of Filing of Petition—Filed Aug. 20, 1931

To the above named Defendant:

You are hereby notified that on or before August 28, 1931, there will be filed in the office of the Clerk of the District Court of the State of Iowa in and for Polk County, the petition of the plaintiff claiming of you the sum of $167.50 with interest at 6 per cent per annum from October 7, 1929, and for the costs of this action, including reasonable attorneys' fees, as money justly due this plaintiff on account of the rescission by this plaintiff of the one certain contract dated September 1st, 1929, by and between yourself and this plaintiff, and wherein the plaintiff agreed to purchase fifteen (15) shares of Cities Service Common stock.

For further particulars see the petition when filed.

Now unless you appear thereto and defend on or before noon of the second day of the September 1931 Term of said court aforesaid, which will be begun and holden on September 8, 1931, at the Polk County Court House in the City of Des Moines, Polk County, Iowa, default will be entered and judgment rendered thereon.

Dated at Des Moines, Iowa, this 23rd day of July, 1931.

[fol. 29] This Original Notice had proper caption and signature and attached to it was the following:

RETURN OF SERVICE

STATE OF IOWA,
County of Polk, ss:

I, H. J. Thoma, being first duly sworn on oath depose and say that the within notice came into my hands on the 29th day of July, 1931, and on the 30th day of July, 1931, I served the same on the defendant, Henry L. Doherty & Company, said Henry L. Doherty & Company being one and the same person as Henry L. Doherty who is engaged in business under the name and style of Henry L. Doherty & Company, by reading said notice to E. A. King, State Manager, and by delivering to him a true copy of the same, all done in Des Moines Township, Polk County, Iowa, the said Henry L. Doherty and/or Henry L. Doherty & Company being a non-resident of Polk County, Iowa, but having an office and agency in the said County of Polk for the transaction of his business, and the said E. A. King being an agent and Clerk employed by the said Henry L. Doherty in said office.

I further depose and say that I also served the within notice on the said Henry L. Doherty & Company by reading said notice to the Hon. G. C. Greenwalt, Secretary of State of the State of Iowa, and by delivering to him two copies of the same on the 31st day of July, 1931, in Lee Township, Polk County, Iowa.

H. J. Thoma.

Subscribed and sworn to in my presence by the said H. J. Thoma on this 3rd day of August, 1931.

J. W. Albert, Notary Public in and for Polk County, Iowa. (Seal.)

[fol. 30] IN DISTRICT COURT OF POLK COUNTY

SPECIAL APPEARANCE OF DEFENDANT—Filed Sept. 8, 1931

Comes now the defendant Henry L. Doherty & Company and appearing specially for the sole purpose of attacking the jurisdiction of the Court states:

1. That Henry L. Doherty is a resident and citizen of the State of New York and transacts much of his business under the name and style of Henry L. Doherty & Company.

2. That at no time material to this controversy has the said Henry L. Doherty been a citizen of Iowa, a resident of Iowa or within the state of Iowa.

3. That Henry L. Doherty & Company is not a corporation, is not a partnership and has no entity other than Henry L. Doherty.

4. That no original notice in this suit has ever been served on the said Henry L. Doherty.

5. That this defendant is informed and believes that plaintiff claims that service of original notice in this suit was made upon this defendant by serving such original notice upon Edward A. King as an alleged agent of the defendant in Des Moines, Iowa; that personal service upon a non-resident of a state cannot be had upon an agent and such a claimed service is invalid.

6. That the said Edward A. King at the time said notice was claimed to have been served upon him did not represent and never has represented this defendant for the purpose of personal service.

(Paragraphs 7, 8 and 9 of the special appearance are now immaterial and are omitted.)

10. Plaintiff seeks a personal judgment against the defendant and no original notice of this suit has ever been served on this defendant. No original notice has been served in any way which gives this Court jurisdiction over the person of this defendant; that this defendant should [fol. 31] not be required to appear further herein and this cause should be dismissed for lack of jurisdiction.

[fol. 32] IN DISTRICT COURT OF POLK COUNTY

STIPULATION AS TO CERTAIN FACTS—Filed Oct. 29, 1932

It is hereby stipulated by and between the parties hereto that for the purpose of determining the questions raised by the special appearance of the defendant, and for such purposes only, it is agreed that the following statements were true at all material times:

E. A. King, who is hereinafter referred to, is one and the same person as E. A. King mentioned in the return of

service on the original notice filed in this cause, and said notice was served as stated in the return thereto.

The defendant Henry L. Doherty & Company is one and the same person as Henry L. Doherty, an individual, the said Henry L. Doherty & Company being the name and style under which the said Henry L. Doherty was doing business in the State of Iowa, and Henry L. Doherty & Company had no existence or entity other than Henry L. Doherty, the individual.

Henry L. Doherty never was a resident of Polk County, Iowa, and never was a resident of the State of Iowa, and was and is now a resident and citizen of the State of New York.

In March, 1926, the defendant Henry L. Doherty & Company leased an office in the City of Des Moines, Polk County, Iowa, for the transaction of business in the State of Iowa, and said office was maintained in Des Moines, Iowa, by the defendant, and the defendant Henry L. Doherty & Company transacted business in said office.

E. A. King was employed by said defendant as District Manager for the State of Iowa, and in pursuance of that employment the said E. A. King took charge of said office in January, 1929, and was the District Manager for the defendant for the State of Iowa, and in charge of said office. In addition to E. A. King there was in said office at Des Moines, Iowa, clerks and also stock salesmen who worked out of said office; that the business carried on by [fol. 33] the defendant in said office was the sale in Iowa of corporate securities, and particularly the securities issued by Cities Service Company. E. A. King had supervision of all other employees in said Des Moines office, and also had supervision of like offices of the defendant which were maintained in Sioux City and Davenport, Iowa.

The name "Henry L. Doherty & Company" was on the door of said office, and Henry L. Doherty & Company was listed in the telephone directory and also in the city directory. The salary or compensation of the people working in said Des Moines office was paid direct from New York City by the defendant.

On the 1st day of September, 1929, a duly authorized agent of the defendant working out of said Des Moines office did at Des Moines, Iowa, solicit the plaintiff in this case, to purchase fifteen shares of the common stock of Cities Service Company, and at said time and place plain-

tiff did agree to purchase from the defendant fifteen shares of said stock and the defendant agreed to sell the same.

Henry L. Doherty employed E. A. King as his agent and authorized him to sell securities and supervise other employees, as aforesaid, and gave him no other express power or authority, save only such as pertained to such selling and supervision. Henry L. Doherty never expressly appointed E. A. King his agent for the purpose of being served with notice of suit, and never expressly agreed or consented that service upon said King should constitute service upon said Doherty. Said King had no power or authority in such respects save only such, if any, as arose by virtue of the Iowa statutes and the facts hereinbefore stipulated.

(The last five paragraphs of this stipulation and the exhibits they describe are now immaterial. These paragraphs and exhibits are omitted.)

[fol. 34] October 29, 1932, the Court, by A. A. Herrick, Judge, made the following:

IN DISTRICT COURT OF POLK COUNTY

ORDER ON SPECIAL APPEARANCE

Now on this 29th day of October, 1932, this matter came on for hearing on the special appearance of the defendant.

Plaintiff appeared by Brammer, Brody, Charlton and Parker, his attorneys, and defendant specially appeared for the sole purpose of attacking the jurisdiction of the court by Lehmann, Hurlburt & Hossfeld, his attorneys, and such special appearance was announced at the time it was made.

The court having heard the parties and being fully advised in the premises, finds the statements of fact contained in the stipulation on file herein and in the return of service of the original notice herein are true.

The court concludes that the foregoing facts show proper personal service of original notice upon the defendant, Henry L. Doherty on July 30, 1931, by the service upon E. A. King, so as to make said defendant personally subject to the jurisdiction of this court.

The court further concludes that the foregoing facts do not show proper personal service of original notice upon

the defendant, Henry L. Doherty, on July 31, 1931 by the service upon G. C. Greenwalt, so as to make said defendant personally subject to the jurisdiction of this court.

The court orders that the special appearance of the defendant should be, and the same hereby is overruled insofar as it attacks the jurisdiction of this court based upon the service upon E. A. King.

The court orders that the special appearance of the defendant should be, and the same hereby is sustained insofar as it attacks the jurisdiction of this court based upon the service upon G. C. Greenwalt.

Defendant is hereby given twenty days to plead or answer.

To all of which both parties except.

Done at Des Moines, Iowa, this 29th day of October, 1932.

[fol. 35] November 23, 1932, the court by John J. Halloran, Judge, entered the following:

IN DISTRICT COURT OF POLK COUNTY

JUDGMENT

Now on this 23rd day of November, 1932, this case came on for hearing on the application of the plaintiff for a default and judgment upon such default.

Plaintiff appeared by Brammer, Brody, Charlton & Parker, his attorneys. Defendant appeared not.

The Court having inspected the record herein and having heard the plaintiff finds:

Defendant heretofore made special appearance herein which this court overruled and has appeared no further. The time for pleading has elapsed and defendant has filed no further appearance and is in default.

The court further finds that judgment should be and hereby is rendered in favor of plaintiff and against defendant for $150.00 together with interest thereon at the rate of 6% per annum from September 26, 1929, and for fifty dollars attorney fees and the costs of this action; to all of which the court gives defendant an exception.

Done at Des Moines, Iowa, the 23rd day of November, 1932.

[fol. 36] IN DISTRICT COURT OF POLK COUNTY

NOTICE OF APPEAL

March 21, 1933, defendant perfected an appeal to the Supreme Court of Iowa by serving proper notice of appeal on the plaintiff and on the Clerk of the District Court of Polk County and filing a copy of the notice with said Clerk.

IN DISTRICT COURT OF POLK COUNTY

CERTIFICATE OF COUNSEL

We, the undersigned, attorneys for appellant, hereby certify that the above and foregoing abstract contains all the proceedings had and rulings and orders made in the course of the hearing of said cause, and that the same is a full, true and complete abstract of the entire record in said cause as made in said court.

Deacon, Sargent, Spangler & Hutchinson, Lehmann, Hurlburt & Hossfeld, Attorneys for Appellant.

Pursuant to Iowa practice, the appellant in his brief duly filed with the Supreme Court of Iowa, made the following Assignment of Errors and the following Points and Authorities and duly argued them to said court:

[fol. 37] IN SUPREME COURT OF IOWA

ASSIGNMENT OF ERRORS

I

The Court erred in holding that the service of the original notice upon E. A. King gave it personal jurisdiction over the defendant. In so holding, the court erred as follows:

1. The court erred in holding that Section 11079 of the Code of Iowa applies to or authorizes service upon a natural person or individual who is a non-resident of Iowa, and who at all times has been outside the boundaries of Iowa.

2. The court erred in failing to hold that Section 11079 of the 1927 Code of Iowa, if construed as authorizing service upon, and applied to, defendant, who is a citizen and resident of the United States and the State of New York, and who at all times has been outside the boundaries of Iowa, denies to defendant the privileges and immunities of citizens in the several states and is in violation of Section 2 of Article IV of the Constitution of the United States, and is invalid.

3. The court erred in failing to hold that Section 11079 of the 1927 Code of Iowa, if construed as authorizing service upon, and applied to, defendant, who is a citizen and resident of the United States and the State of New York, and who at all times has been outside the boundaries of Iowa, abridges the privileges and immunities of citizens of the United States to which defendant is entitled, and is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and is invalid.

4. The court erred in failing to hold that Section 11079 of the 1927 Code of Iowa, if construed as authorizing servive upon, and applied to, defendant, who is a citizen and resident of the United States and the State of New York, and who at all times has been outside the boundaries of Iowa, deprives defendant of property without due process of law, and is in violation of Section 1 of the Fourteenth [fol. 38] Amendment to the Constitution of the United States, and is invalid.

5. The court erred in that it denied to the defendant, a citizen of the State of New York, the privileges and immunities of citizens in the several states, in violation of Section 2 of Article IV of the Constitution of the United States.

6. The court erred in that it abridged the privilege and immunities of defendant, a citizen of the United States, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

7. The court erred in that it deprived defendant of property without due process of Law, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

[fol. 39] IN SUPREME COURT OF IOWA

POINTS AND AUTHORITIES

I

Properly construed, section 11079 of the 1927 Code of Iowa applies only to service on residents of Iowa who maintain an office or agency in an Iowa county other than the county of their residence.

Code of 1851, Chapter 101, Section 1705.
Revision of 1860, Chapter 118, Section 2801.
Revision of 1860, Chapter 120, Section 2827.
Code of 1927, Section 11079.
Brooks v. Dun, 51 Fed. 138.

II

If construed to apply to citizens and residents of other states of the Union who maintain an office or agency in some county in Iowa the section when so construed and applied is without force or effect because no sovereign can by its own act, legislative or otherwise, give itself power or jurisdiction over either persons or things which are and have been beyond its boundaries. The jurisdiction of a sovereign extends to and stops at its territorial boundaries.

Story Conflict of Laws, Par. 539.
New York Life Ins. Co. v. Dunlevy, 241 U. S. 518, 60 L. Ed. 1140.

III

Iowa does not have jurisdiction by consent.

A. There was no express consent.

B. A citizen and resident of one State has the right to do business in another State and so doing is not an implied consent to submit his person to the jurisdiction of such other State.

Hess v. Pawloski, 274 U. S. 352, 71 L. Ed. 1091.
Flexner v. Farson, 248 U. S. 289, 63 L. Ed. 250.
Moredock v. Kirby, 118 Fed. 186.
Fisher & Van Gilder v. First Trust Bank, 210 Iowa 534.

[fol. 40] IV

If construed to apply to citizens and residents of other States who maintain an office or agency in Iowa, the section when so construed and applied is invalid because in conflict with the provisions of the Constitution of the United States.

A. It is in conflict with Article IV, section 2 of the Constitution of the United States, providing:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

B. It is in conflict with section 1 of the Fourteenth Amendment to the Constitution of the United States, providing:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; * * *"

Pennoyer v. Neff, 95 U. S. 714; 24 L. Ed. 565.
Raher v. Raher, 150 Ia. 511.
Ralya Market Co. v. Armour & Co., 102 Fed. 530.
Cabanne v. Graf, 87 Minn. 510; 92 N. W. 461.
Flexner v. Farson, 248 U. S. 289; 63 L. Ed. 250.
Fisher and Van Gilder v. Bank, 231 N. W. 670 (Iowa 1930).
Moredock v. Kirby, 118 Fed. 180.

[fol. 41] On June 23, 1932, the Supreme Court of Iowa duly entered the following Opinion and Order:

IN SUPREME COURT OF IOWA

This action was brought by Goodman against the defendant, Henry L. Doherty & Company, for damages. The action is predicated upon an illegal sale of securities made to the plaintiff by the duly authorized agent of Doherty. Service of original notice was made under the provisions

of section 11079 of the Code, upon the defendant's agent, who made the illegal sale. The defendant entered only a special appearance to challenge the jurisdiction of the court. As ground of his challenge he averred that he was a citizen and resident of the State of New York and that he had never at any time been within the borders of the State of Iowa. He also averred that he operated a business in Iowa under the trade name of Henry L. Doherty & Company and that he was the sole owner of such business; that the service of original notice upon his agent was at no time authorized by him and that such service was null and void as to him.

The district court overruled the special plea and held that the service upon the agent was good as against the defendant. No further appearance was made by the defendant and the court entered judgment against him as prayed in the petition.

From such judgment he has appealed.

Affirmed.

Deacon, Sargent, Spangler & Hutchison, Cedar Rapids; Lehmann, Hurlburt & Hossfeld, Des Moines, Attorneys for Appellant.

Brammer, Brody, Charlton & Parker, Des Moines, Attorneys for Appellee.

OPINION

EVANS, J:

Respective counsel for the contending parties unite in the statement that the case of Davidson v. Henry L. Doherty & Company, 214 Iowa 739, is determinative of the case at bar unless it be overruled herein. The cited case was an action by Davidson against the same defendant herein and was predicated upon a cause of action identical in its issues with that herein. The arguments of counsel [fol. 42] in both cases are substantially identical. The material facts were stipulated in each case. That the defendant was never personally within the State of Iowa, is conceded by the plaintiff. It is likewise conceded that the defendant personally established his office in Iowa and caused his name to be placed upon the office door and caused all business to be transacted in his name and not otherwise. The question raised is whether it is legally

possible by force of any statute of Iowa, for the courts of Iowa, to acquire personal jurisdiction of a non-resident who is doing business within the State of Iowa, if such non-resident has never in fact brought his person within the borders of the State. The argument of appellant herein is the fair equivalent of a petition for rehearing in the Davidson case. The legal questions now raised herein were all presented in the Davidson case and were very fully considered therein. Decision was attained by a divided court. The majority opinion necessarily prevailed. The reasons pro and con for the respective opinions are fully stated therein. That the questions thus considered are debatable and close, may be readily conceded. They have been so regarded by the judiciary of the country for many years. The ultimate question has been often approached, but never quite decided. A citation of the Davidson case as a precedent, is an all-sufficient argument for the decision of this case. The only door of argument open to the appellant is to seek the overruling of the opinion in the Davidson case. The fact that the decision was close and doubtful is urged by the appellant as a reason for its overruling. Such reason is not adequate. We were under the same duty of original decision whether the case were close and doubtful or otherwise. There are strong practical reasons why we should not be swift or willing to overrule a decision, which has been arrived at after full consideration and without inadvertence or misunderstanding. As a precedent it has become a practical verity; and no less such because it is doubtful, or deemed so. It became at once a beacon to trial judges and a rule for the decision of other cases. To treat [fol. 43] a question thus settled as still open, is to convert the beacon into a will-o'-the-wisp and to destroy quite, the force and effect of the law of precedent as a guide to the rights of litigants. And this is no less true even though the decision shall have been rendered by a divided court. Divided opinion in arriving at a decision is not uncommon or inappropriate. But after decision, the court ceases to be divided thereon and becomes unanimously obedient to the precedent. If the judicial rule were otherwise it would subject all precedents to a rediscussion and reconsideration with every change in the personnel of the court. Such a course would be quite intolerable. Since the decision of the Davidson case, there has been a substantial change of personnel in this court. If we were called upon to realign

our membership in the reconsideration of previous cases supposedly doubtful, it would necessarily result in putting the stamp of uncertainty upon every precedent. If a majority of us were not disposed to overrule the Davidson case, and should vote accordingly, we would, or might, still be a divided court and be still confronted with as many reasons for a later realignment to the contrary, as confront us now. Precedents are the stepping stones of the law in its goings. Once placed, they should not be lightly displaced. Such, broadly, is the reason why an appellate court consents to the overruling of a prior decision only in a very exceptional case. It will be soon enough to overrule this precedent, if and when, superior authority so rules.

Obedient thereto, the judgment appealed from is accordingly affirmed.

Affirmed.

CLAUSSEN, C. J., STEVENS, ALBERT, ANDERSON, KINTZINGER, DONEGAN, J. J., concur.

[fol. 44] IN SUPREME COURT OF IOWA

42214

FRANK GOODMAN, Appellee,

vs.

HENRY L. DOHERTY & COMPANY, Appellant

DISSENTING OPINION

MITCHELL, J., dissenting:

I was not a member of the court at the time the opinion in Davidson vs. Henry L. Doherty & Company, reported in 214 Iowa, 739, was decided. Had I been, I would have joined in the dissenting opinion filed by the late Justice Morling.

I concur in the dissenting opinion of Justice Kindig.

IN SUPREME COURT OF IOWA

42214

FRANK GOODMAN, Appellee,

vs.

HENRY L. DOHERTY & COMPANY, Appellant

DISSENTING OPINION

KINDIG, J., dissenting:

I am unable to agree with the result reached by the majority in this case, as I was unable to agree with the result reached by the majority in Davidson v. Henry L. Doherty & Company, 214 Iowa, 739.

[fol. 45] It is the theory of the majority that the Davidson case decides the present controversy, and that the rule of stare decisis precludes a dissent at this time. The rule of stare decisis would control were the controversy here one to be finally determined by this court, but a federal constitutional question is involved. Therefore, the judgment of this court is not final. A former decision of this court does not make a result constitutional if, in fact, the judgment which brings about such result is in conflict with the Constitution of the United States.

Under the circumstances of this record, it is my belief that the courts of Iowa have no constitutional power to render a judgment in personam against the appellant, Henry L. Doherty, for the reason that he has not been served with notice of the suit within this State. Doherty has not been present in the State, although he conducted business here through an agent. He is a resident of New York State, and a non-resident of the State of Iowa. His agent in Iowa had no contractual authority to accept, on his behalf, the service of the notice of suit in this State; nor did such agent, because of contract, constitute a person upon whom substituted service of the notice of suit could be made upon Doherty.

Section 11079 of the 1931 Code of Iowa, relied upon by a majority, does not purpose to make the appointment of an agent a prerequisite to Doherty's right to do business in this State. That section contains the following provi-

sions: "When a corporation, company, or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency." It was said by this court in Davidson v. Doherty & Co., 214 Iowa, 739, supra, that the foregoing section gave Davidson the right to sue Doherty in Iowa by serving the notice of suit on Doherty's Iowa agent in Polk County.

[fol. 46] Consequently, if Doherty's agent in Iowa possessed the power to be served with an original notice of a suit on Doherty, such power must have arisen through contract or statute. But such contract did not exist. If, on the other hand, section 11079, relied upon by the majority, contrary to its terms attempts, by some theory or other, to make the appointment of an agent who can be served with notice of suit in Iowa a prerequisite for Doherty's right to do business in this state as an individual, then the same becomes unconstitutional because under the Federal Constitution the State of Iowa has no right to render personal judgment against a non-resident person not properly served with notice in this state. Flexner v. Farson, 248 U. S. 289, 63 L. Ed. 250. See also Hess v. Pawloski, 274 U. S. 352, 71 L. Ed. 1091. Before the adoption of the Federal Constitution, each state, as is well known, was an independent nation, theoretically, at least, possessing all the powers and prerogatives of any independent nation. When the Federal Constitution was adopted, these free and independent states did not surrender all their powers to the Federal Government, but only those expressly or impliedly named in or prohibited by the Federal Constitution. Other powers of the states were retained by them. See the Tenth Amendment to the Constitution of the United States. So, one state has no power over the citizens of another state, except as provided by the Federal Constitution. Prior to the adoption of the Federal Constitution, a citizen of one state could not, through a court action, acquire jurisdiction over a citizen of another state except by going into the foreign state. Likewise, under the Constitution, a citizen of one state cannot, through a court action, acquire jurisdiction of a citizen — another state without going into that state, except as provided by the Constitution of the United States.

The suit in question does not involve an action in rem growing out of an attachment or other process on Doherty's property within the State of Iowa. Moreover, the suit in [fol. 47] question does not involve a statute of the State of Iowa passed under its police power. No doubt, under the Securities Act, the State of Iowa could require Doherty, as a prerequisite to his doing business in Iowa, to appoint an agent upon whom substituted service on the principal could be made in Iowa. That authority exists in Iowa because of its police power. As said before, however, the police power of Iowa is not involved in section 11079 of the 1931 Code. Nor is this a case like that involved in Hess v. Pawloski, 274 U. S. 352, supra, and like cases. There the non-resident, by operating his automobile in a non-resident state, consented that the registrar of the foreign state would thereby be constituted an agent for the non-resident automobile driver, upon whom notice of suit for a tort growing out of the operation of the automobile in the foreign state might be served. Plainly, however, this authority of the foreign state is based upon the police power of that state, including the power to regulate its own highways. Furthermore, in the highway case just contemplated, the defendant actually was in the foreign state, and while there committed the tort which gave rise to the court action.

At this juncture, we must not confuse the law applicable in the case at bar with the law relating to the service of notice on foreign corporations. A corporation, being an artificial person, is by fiction considered to be within the state when it transacts business therein. Limitations may be made a prerequisite which must be met by the foreign corporation before it can enter a state. That is true even though the same prerequisite could not be required of an individual before entering the state. There must be no confusion, therefore, when the law applicable to the case at bar is compared with the law relating to the service of notice on foreign corporations. A clear distinction exists between the two principles of law. So, in the case at bar it is manifest that the district court in Iowa did not obtain [fol. 48] jurisdiction to render a personal judgment against the appellant Doherty.

For the sake of brevity, I adopt and add hereto by this reference the dissenting opinion written by the late Mr.

Justice Morling in the case of Davidson v. Henry L. Doherty & Company (214 Iowa, 739), supra.

[fols. 49 & 50] IN SUPREME COURT OF IOWA

42214

FRANK GOODMAN

vs.

HENRY L. DOHERTY & Co., Appellant

Appeal from Polk District Court.

JUDGMENT—June 23, 1934

In this cause, the Court being fully advised in the premises, file their written opinion affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be, and it is hereby, affirmed, and that a writ of procedendo issue accordingly.

It is further considered by the Court that the appellant pay the costs of this appeal, taxed at $—— and that execution issue therefor.

[fol. 51] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed Oct. 17, 1934

Comes now Appellant, defendant below, and adopts his Assignments of Error heretofore filed herein and his Assignments of Error and Points and Authorities heretofore filed with the Supreme Court of Iowa, and a part of the record herein, as his statement of the points to be relied upon, and represents that the whole of the record as filed is necessary for consideration of the case.

Fred. W. Lehmann, Jr., William B. Hurlburt, Harrison E. Spangler, Attorneys for Appellant.

Service of the foregoing statement and receipt of copy thereof is hereby acknowledged. All done at Des Moines, Polk County, Iowa, this 17 day of September, 1934.

Joseph I. Brody, Louis A. Parker.

[fol. 52] [File endorsement omitted.]

Endorsed on cover: File No. 39,097. Iowa Supreme Court. Term No. 469. Henry L. Doherty & Company, Appellant, vs. Frank Goodman. Filed October 17, 1934. File No. 469, O. T., 1934.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Federal statutes giving jurisdiction	1
The State statute involved	2
The decision of the Supreme Court of Iowa and date of application for appeal	2
The nature of the case	3
The present appeal	5

Table of Cases Cited.

Flexner v. Farson, 248 U. S. 289, 63 L. Ed. 250	6
Hendrick v. Maryland, 235 U. S. 610, 59 L. Ed. 385	6
Hess v. Pawloski, 144 N. E. 760, 149 N. E. 122	7
Hess v. Pawloski, 274 U. S. 352, 71 L. Ed. 1091	6
Kane v. New Jersey, 242 U. S. 160, 61 L. Ed. 222	6
McDonald v. Mabee, 243 U. S. 90, 61 L. Ed. 608	6
Michigan Trust Co. v. Ferry, 228 U. S. 346, 57 L. Ed. 867	6
New York Life Ins. Co. v. Dunlevy, 241 U. S. 518, 60 L. Ed. 1140	6
Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565	5
Wuchter v. Pizzutti, 276 U. S. 13, 72 L. Ed. 446	6

Statutes and Authorities Cited.

Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937, Judicial Code, Section 237 (28 U. S. C. A. 344)	1
Act of January 31, 1928, Chapter 14, 45 Stat. 54, as amended by the Act of April 26, 1928, Chapter 440, 45 Stat. 466 (28 U. S. C. A. 861a and 861b)	2
Code of Iowa of 1927, Section 11079	2, 4, 5, 7
Section 11088	4
Constitution of the United States, Article IV, Section 2	5
14th Amendment, Section 1	5
Story, Conflict of Laws, Par. 539	5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 469

HENRY L. DOHERTY & COMPANY,

Appellant,

vs.

FRANK GOODMAN.

STATEMENT OF JURISDICTION OF UNITED STATES SUPREME COURT ON APPEAL.

A.

Federal Statutes Giving Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937, Judicial Code Section 237, 28 U. S. C. A. Section 344 provides:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, • • • where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution • • • of the United States, and the decision is in favor of its validity may be reviewed by the Supreme Court upon a writ of error."

Paragraph (b) of the same statute provides for similar review of such cases by certiorari and paragraph (c) provides that seeking writ of error when certiorari was the correct procedure shall not prevent a review on the merits just as if certiorari had been actually sought.

The Act of January 31, 1928, Chapter 14, 45 Stat. 54, as amended by the Act of April 26, 1928, Chapter 440, 45 Stat. 466; U. S. C. A. Title 28, Sections 861a and 861b abolish writs of error and provide that all relief theretofore obtainable under writ of error can thereafter be obtained by appeal, and make the statute regulating writs of error applicable to appeals.

B.

The State Statute Involved.

Section 11079 of the 1927 Code of Iowa reads:

> "*Actions arising out of agency.* When a corporation, company, or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

And, the present case challenges its validity on the grounds that it is repugnant to the Constitution of the United States.

C.

The Decision of the Supreme ourt of Iowa and Date of Application for Appeal.

The Supreme Court of Iowa, the highest court of the State, rendered a final decision in favor of the validity of the statute on June 23, 1934, and the accompanying petition for appeal is presented on the 17th day of September, 1934, less than three months after the decision.

D.

The Nature of This Case.

While the caption of the petition names the defendant as Henry L. Doherty & Company, it is fully admitted by all parties that this is but the trade name under which Henry L. Doherty did some of his business, and that Henry L. Doherty, the individual, is the one and only defendant.

Henry L. Doherty is an individual, a citizen and resident of the State of New York and of the United States. He is neither a resident nor a citizen of Iowa. So far as is material, he was never present in person within the boundaries of Iowa.

Plaintiff sought a personal money judgment against Henry L. Doherty and asked no other relief.

Henry L. Doherty maintained an office in Des Moines, Polk County, Iowa. E. A. King was an agent employed in this office; the cause of action grew out of the business of the office.

In Iowa, actions are commenced by serving an "original notice." This is the step by which our courts acquire jurisdiction.

An original notice addressed to the defendant was served on E. A. King, the return of service stating that it was served

> "on the defendant Henry L. Doherty & Co., said Henry L. Doherty & Co. being one and the same person as Henry L. Doherty who is engaged in business under the name and style of Henry L. Doherty & Co. by reading said notice to E. A. King, State Manager * * * All done in Des Moines township, Polk County, Iowa, said Henry L. Doherty and/or Henry L. Doherty & Co. being a non-resident of Polk County, Iowa, but having an office and agency in said County of Polk for the transaction of his business and the said

E. A. King being an agent and clerk employed by the said Henry L. Doherty in said office."

Plaintiff brought no attachment, garnishment, libel or other *in rem* proceedings. The service shown by this return is the sole and exclusive basis of all jurisdiction claimed.

The defendant Doherty filed a special appearance for the sole purpose of attacking the jurisdiction of the court as provided by Section 11088 of the Code of Iowa, reading:

> "*Special Appearance.* Any defendant may appear specially for the sole purpose of attacking the jurisdiction of the court. Such special appearance shall be announced at the time it is made and shall limit the party to jurisdictional matters only and shall give him no right to plead to the merits of the case."

The trial court overruled the special appearance, and gave defendant time to plead. Pleading under Iowa practice waives all right to question jurisdiction. Defendant failed to plead and final judgment by default was rendered against defendant. Defendant appealed to the Supreme Court of Iowa and this Court sustained the action of the trial court.

In the trial court and on the appeal to the Supreme Court of Iowa, defendant raised two main points:

First. Properly construed, Section 11079 applied only to individual principals who resided in one county in Iowa and had an office in another county in Iowa, and did not apply to individual principals who resided in some county in, and were citizens of, some State other than Iowa. Both the trial court and the Supreme Court of Iowa held that the section applied to individual principals who resided in and were citizens of a State other than Iowa.

Second. Defendant raised the point that if the section was construed to apply to principals who resided in and

were citizens of some State other than Iowa, then the Section was repugnant to Section 2 of Article IV of the Constitution of the United States, in that it abridged the privileges and immunities of the citizens of the several States, and was also repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it was a State law which abridged the privileges and immunities of citizens of the United States and deprived a person of property without due process of law.

Both the trial court and the Supreme Court of Iowa held against defendant on the issues thus raised. Both courts held that Section 11079 was not repugnant to any provision of the Constitution of the United States, was a valid statute and that service upon an agent pursuant to its terms gave an Iowa court full personal judgment over the person of a non-resident who was a citizen of another State. As a result on the appeal the Iowa Supreme Court sustained the overruling of the special appearance and affirmed the personal judgment against Doherty.

The Present Appeal.

On appeal to the United States Supreme Court, we are bound by the interpretation put upon the Iowa Statute by the Supreme Court of Iowa, and we present only the constitutionality of the statute, Section 11079.

The jurisdiction of the Supreme Court of the United States to pass upon the constitutionality of statutes whereby a State seeks to make non-residents subject to its jurisdiction is shown in a long line of all too well known cases.

In our support we cite:

Story Conflict of Laws, Par. 539;

Pennoyer v. *Neff*, 95 U. S. 714, 24 L. Ed. 565;

Michigan Trust Co. v. *Ferry*, 228 U. S. 346, 57 L. Ed. 867;
New York Life Ins. Co. v. *Dunlevy*, 241 U. S. 518, 60 L. Ed. 1140;
McDonald v. *Mabee*, 243 U. S. 90, 61 L. Ed. 608;
Flexner v. *Farson*, 248 U. S. 289, 63 L. Ed. 250.

We distinguish all cases involving corporate defendants because corporations have none of the rights of citizens upon which this defendant relies.

We distinguish all cases involving a written instrument signed by defendant which, perhaps, appointed an agent for service or, perhaps, consented to some method of service, because no such instrument is involved in the present appeal.

We distinguish all cases involving consent of the defendant because the statute is in no way based upon consent, either actual or implied.

We distinguish:

Hendrick v. *Maryland*, 235 U. S. 610, 59 L. Ed. 385;
Kane v. *New Jersey*, 242 U. S. 160, 61 L. Ed. 222;
Hess v. *Pawloski*, 274 U. S. 352, 71 L. Ed. 1091;
Wuchter v. *Pizzutti*, 276 U. S. 13, 72 L. Ed. 446;

because in each and all of these cases the defendant was actually, personally, physically present within the State asserting jurisdiction, and was present at the transaction from which the cause of action arose. In these cases the defendant was within the boundaries of, and physically subject to, the jurisdiction of the State, subject to arrest if need be. Either by his personal entrance and use of the State highways the defendant consented to the jurisdiction of the State or the State actually seized and the defendant asserted its jurisdiction and let him go subject to such jurisdiction.

Perhaps the opinion in *Hess* v. *Pawloski* does not clearly show that Hess was personally driving his car when the accident occurred. At least Goodman argued it does not. The two opinions of the Massachusetts court at 149 N. E. 122 and 144 N. E. 760, and the record on which the opinion of the Supreme Court of the United States was based foreclose all debate on this point. Hess personally was driving his car in Massachusetts.

Section 11079 is based upon no special police power, applies to no special business, is not called into action by a precedent use of the State's highways or other property. There is no requirement of consent, actual or implied, from conduct or acquiesence. Sweeping in its terms, it makes every citizen of every State in the Union personally subject to the jurisdiction of the courts of Iowa if the plaintiff can find an agent within Iowa upon whom a notice can be served. It holds that a citizen of another State remaining in his own State is personally subject to the jurisdiction of Iowa if he maintains an agent in Iowa. In not one of the similar cases where jurisdiction in the State has been denied has any such broadcast jurisdiction been asserted.

This case forms one of the long chain of cases following *Pennoyer* v. *Neff* in which the constitutionality of a State statute seeking to give the State courts jurisdiction over a non-resident is the sole question involved.

The Supreme Court of the United States has always insisted upon its jurisdiction to pass upon this question.

Respectfully submitted,

FRED W. LEHMANN, JR.,
WILLIAM B. HURLBURT,
HARRISON E. SPANGLER,
Attorneys for Henry L. Doherty & Company, Appellant.

(5537-C)

17

FILE COPY

FILED
DEC 28 1934
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1934.

No. 469

HENRY L. DOHERTY & COMPANY, *Appellant,*

vs.

FRANK GOODMAN, *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

APPELLANT'S BRIEF AND ARGUMENT.

FRED W. LEHMANN, JR.,
WILLIAM B. HURLBURT,
HARRISON B. SPANGLER,
Attorneys for Appellant.

Supreme Court of the United States

OCTOBER TERM 1934.

No. 469

HENRY L. DOHERTY & COMPANY, *Appellant,*

vs.

FRANK GOODMAN, *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

APPELLANT'S BRIEF.

SUBJECT INDEX.

	Page
Opinion Below	3
Jurisdiction	3
Statement of Case	3
Errors to be urged	6
Argument	6
Summary	6
Point I	7
Point II	10
Appendix Davidson Case Opinion	19
Minority Opinion	34

TABLE OF CASES.

Brooks v. Dun, 51 Fed. 138	16
Cabanne v. Graf, 87 Minn. 510	12
Davidson v. Doherty, 214 Iowa 739	19
Flexner v. Farson, 248 U. S. 289	9, 16
Hess v. Pawloski, 274 U. S. 352	14
McDonald v. Mabee, 243 U. S. 90	14
Michigan Trust Co. v. Ferry, 228 U. S. 346	15
Moredock v. Kirby, 118 Fed. 180	16
New York Life v. Dunlevy, 241 U. S. 518	16
Pennoyer v. Neff, 95 U. S. 714	11

Raher v. Raher, 150 Iowa 511 12
Ralya Market Co. v. Armour & Co., 102 Fed. 530 16

TEXT BOOKS.

Story Conflict of Laws Par. 539 10

STATUTES.

1927 Code of Iowa Section 11079 11

OPINION BELOW.

The opinion of the Iowa Supreme Court in *Goodman vs. Doherty* was handed down June 23, 1934, and became final when the time for serving notice of intention to ask for rehearing expired thirty days thereafter. The opinion is not yet officially reported in the Iowa Reports, but is printed at Page 19 of the record and also at 255 Northwestern Reporter 667.

The majority opinion does not discuss the questions at bar. By a seven to two majority the court held that *stare decisis* required it to follow the opinion in *Davidson vs. Doherty*, 214 Iowa 739 decided March 8, 1932.

The *Davidson* case involved two services, one in all respects similar to the service at bar, the other quite different and not here in issue. The court by a five to four majority sustained the service. The *Davidson* appeal was from an interlocutory order, hence, could not be further appealed to this court. Since the *Davidson* opinion is the only opinion showing the decision of the Supreme Court of Iowa on the questions now at issue, it is printed in full as an appendix to this brief.

JURISDICTION.

Paragraph 1 of Rule 12 was complied with and probable jurisdiction has been noted.

STATEMENT OF CASE.

The facts are not disputed and are shown by a stipulation (Transcript Page 12).

At all times material, Frank Goodman was a resident and citizen of Des Moines, Polk County, Iowa. Henry L. Doherty was a resident and citizen of New York City, New

York, and of the United States. So far as is material, Doherty never was within the State of Iowa.

Section 11079 of the 1927 Code of Iowa read:

> "Actions arising out of agency. When a corporation, company, or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

Doherty had an office or agency in Des Moines, Polk County, Iowa. Goodman had a claim (the merit of which is not here in issue) against Doherty which grew out of, and was connected with that office or agency. Goodman brought action against Doherty for $167.50 and no other relief. He asked no relief *in rem* or *quasi in rem;* no attachment or garnishment, nothing but a personal money judgment. (The petition, Transcript Page 8).

This action was brought in the Polk County District Court which sits at Des Moines.

Under Iowa practice a court acquires jurisdiction through the service of what our statutes call a notice and lawyers habitually call an "original notice".

The original notice in this case was directed to Henry L. Doherty & Company and the return shows how it was served. (Transcript Page 11).

> "I served the same on the defendant, Henry L. Doherty & Company, said Henry L. Doherty & Company being one and the same person as Henry L. Doherty who is engaged in business under the name and style of Henry L. Doherty & Company, by reading said notice to E. A. King, State Manager, and by delivering to him a true copy of the same, all done in Des Moines Township, Polk County, Iowa, the said Henry L. Doherty and/or Henry L. Doherty & Company being a non-resi-

dent of Polk County, Iowa, but having an office and agency in the said County of Polk for the transaction of his business, and the said E. A. King being an agent and Clerk employed by the said Henry L. Doherty in said office."

The petition names the defendant as Henry L. Doherty & Company, but alleges that this is a trade-name under which one Henry L. Doherty, is doing business.

Both parties agree that Henry L. Doherty, the individual, is the one and only defendant. Iowa recognizes the right of an individual to do business under a trade-name and Goodman claims nothing because he added "& Company" to the defendant's name.

Doherty filed special appearance (Transcript Page 11) attacking the jurisdiction of the court. This is the Iowa equivalent of a motion to quash service. He set up the facts as above recited and denied the jurisdiction of the court, on four grounds:

I. Properly construed Section 11079 applied only to defendants who maintained an office or agency in one county, and resided in another county in Iowa, and did not apply to non-residents of Iowa who had always remained outside of Iowa even though they maintained an office in Iowa.

II. If construed to apply to non-residents of Iowa, the statute was repugnant to Section Two of Article Four of the Constitution of the United States and invalid.

III. If construed to apply to non-residents of Iowa, the statute was repugnant to Section One of the Fourteenth Amendment to the Constitution of the United States and invalid.

IV. Doherty had never been in Iowa. No statute and no act of Iowa could give that state personal jurisdiction over the citizen of another sovereign who had never been within Iowa.

The facts were stipulated by the parties and the trial

court overruled the special appearance. (Transcript Page 14).

In Iowa, pleading to the merits waives pleas to the jurisdiction. Doherty stood on his special appearance and judgment for $150.00 and interest and $50.00 attorney fees was entered against him by default (Transcript Page 15). Doherty appealed to the Supreme Court of Iowa and there presented the same issues he had raised before the trial court. The Supreme Court of Iowa affirmed the trial court (Transcript Page 19). Doherty now appeals to this court.

On the first point, the interpretation of the statute, and determining whether or not it applied to a defendant who was a non-resident of Iowa, we are bound by the interpretation of the Iowa Supreme Court. The Statute has been so interpreted and so applied. The pleas that the statute so interpreted and so applied is unconstitutional and invalid Doherty presents to this court.

ERRORS TO BE URGED.

Nine assignments of error are made and all will be urged, for the nine assignments are but different phrasing of the contention that the lower courts erred in not holding that when applied to a citizen of another state who never was in Iowa, Section 11079 is repugnant to Section 2 of Article IV and to Section 1 of the Fourteenth Amendment to the Constitution of the United States and therefore invalid.

ARGUMENT.

SUMMARY.

1 No sovereign can by its own act give itself jurisdiction beyond its own borders. The lack of power to enforce makes the assertion a nullity. An effort to enforce is war, not due process of law.

2. Henry L. Doherty, a citizen of New York and of the United States, had an unqualified right to come into Iowa for business or pleasure. If he did come into Iowa, he would be, while in Iowa, subject to the jurisdiction of Iowa. He never came into Iowa. He had an equal right to remain in New York, where he was subject to the laws of New York, and not subject to the laws of Iowa. This he did.

Henry L. Doherty had an unqualified right to employ an Iowan as his agent. He so employed King. King was in Iowa and King's conduct was subject to control by Iowa. King was accountable to the sovereign State of Iowa within whose borders he dwelt. If Iowa seeks to make Doherty, who was always outside of Iowa, personally subject to Iowa's sovereignty because he employed King within Iowa, then Iowa is imposing an improper condition or restriction on Doherty's unqualified right to employ an Iowan as his agent and in so doing, Iowa is denying to Doherty the privileges and immunities of citizens in the several states in violation of Section 2 of Article IV of the Constitution and is also attempting to abridge the privileges and immunities of a citizen of the United States in violation of Section 1 of the 14th Amendment to the Constitution.

I.

NO SOVEREIGN CAN BY ITS OWN ACT GIVE ITSELF JURISDICTION BEYOND ITS OWN BORDERS.

There are but two ways a sovereign can obtain jurisdiction over an individual.

1. By the consent of the individual. In this case all claim or question of consent is absent.
2. By the sovereign's exercise of its own greater power. In this case the sovereign had no power.

Jurisdiction based on the exercise of the sovereign's own greater power is limited by the power of that sover-

eign. A sovereign is not omnipotent. Often its desires are thwarted by its lack of power. Its desires are limited only by the ambitions of the men in control of its policies; its powers are limited by its boundaries. It can assert jurisdiction over such lands, such chattels and such people as are within its borders. If it desires a wider jurisdiction, it must first expand its borders, and this expansion of border, when not based on consent, is not due process of law. It is war.

The jurisdiction and the territorial domain of the sovereign are one and the same. To deny the jurisdiction within the domain is revolution. We have seen this happen. In 1776 we denied the jurisdiction of the sovereign within its borders. An army made the denial good. The former sovereign ceased to claim jurisdiction. Since then, once on a large scale, several times on a small scale, the jurisdiction of the United States has been denied within its borders. The army supporting these denials could not make them good, and the denials were withdrawn. According to their size we call these incidents riots or rebellions. Whatever their name, they are war and they are not due process of law.

For a sovereign to assert jurisdiction beyond its borders is an equally certain departure from law and order, an equally open invitation to war.

In our early days England asserted a jurisdiction over our ships and citizens on the high seas. This was one of the causes of the war of 1812. Her armies failed to make the assertion good and it was withdrawn.

In 1848 we desired an extension of our jurisdiction to the Southwest. A successful army pushed our borders to the Rio Grande and we have since exercised jurisdiction to that river.

In 1898 we had desires in Cuba and sent the *Maine* to

give them weight. As our army was successful our jurisdiction in Cuba was increased.

In 1916 we sought to exercise jurisdiction south of the Rio Grande. Captain Boyd died at Carrizal. We decided the matter did not justify a war. Our army did not extend our borders, our soldiers withdrew and our jurisdiction is still limited by the Rio Grande.

Desires of various sovereigns to exercise jurisdiction over the Rhine Valley have kept its vineyards soaked with blood since the days of Caesar and the last is not yet shed. The sun never sets on the British flag and the history of the spread of England's jurisdiction beyond her own shores is but the story of gunpowder.

None of these incidents involve due process of law. All involve manslaughter.

The states of our Union are sovereigns, who by consent gave another sovereign, the United States, certain jurisdiction within their territory. Never did they give the other states any such jurisdiction.

We have not yet had a war between two of our states, even when a jurisdiction is asserted by one state and denied by another. We have come dangerously close to it. The State of Georgia held in prison a man this court declared innocent. The militia has more than once been called to resist the officers of the United States and the activities of other states. Do all these incidents belong to the remote past? How long ago was it that the newspapers carried the photograph of a governor, revolver on his hip, at the head of his militia, guarding a bridge-head leading to a sister state, to prevent the enforcement of a court decree?

In *Flexner vs. Farson*, 248 U. S. 289, Kentucky asserted jurisdiction over a citizen of Illinois. Illinois denied it. What would the result have been had Kentucky sought to

enforce the jurisdiction she asserted? Certainly not due process of law.

This court decided Kentucky had no such jurisdiction. Assume the decision had been the other way. Should Illinois accept the wrong decision and submit to trespass by Kentucky? Would she have done so? Would she have done so had she been Oklahoma in conflict with Texas?

The assertion of jurisdiction beyond the borders can be made good only by an army. It breeds war, the complete denial of all law, and where it fails of complete fruition it, at least, breaks respect for law, and by no possibility can it be called the due process of the law.

Section 11079 when construed to apply to the citizens of other states is but an effort by Iowa to favor the convenience of an Iowa citizen at the expense of the citizens of other states. As such it must properly be resented by the other states. Did Iowa seek to assert such a jurisdiction over the citizen of a county in England she would be so completely and contemptuously ignored that the claim would never attain the dignity of a diplomatic incident. New York will, doubtless, be more courteous, but should not be more subservient. The section promotes friction between the states, dissension within the Union, disrespect for court decrees. This is not due process of law.

II.

THE RIGHTS OF A CITIZEN.

"No sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity."
Story Conflict of Laws Par. 539.

"When a corporation, company, or individual has, for the transaction of any business, an office or agency

in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

Section 11079, Code of Iowa, 1927.

The facts bring this case exactly within the terms of Section 11079 as construed by the Iowa Supreme Court, and not one additional fact is present to aid or support the statute. The issue is clear cut. Either the text of Mr. Justice Story or the Act of the Iowa Legislature must fall.

To state the issue is to answer it. This text has been quoted and approved in numberless opinions of the Supreme Courts of the United States and of the States until it is as much a part of our constitution as the document itself.

Written in the early days of our nation to curb the selfish activities of the sovereign states the text had a troubled history until shortly after the Civil War when the Fourteenth Amendment to the Constitution was adopted. During this early period various states had asserted jurisdiction beyond their borders and some state courts had more or less sustained these assertions. Such acts were steps toward the end of law, and the beginning of war. Then the Fourteenth Amendment came to the support of Justice Story and with *Pennoyer v. Neff*, 95 U. S. 714, this chapter of our early troubles almost ended.

We need not now consider the early cases for the Fourteenth Amendment so changed the situation that we can fairly confine ourself to the cases decided under it. The first of these is:

Pennoyer v. Neff, 95 U. S. 714.

Neff, a non-resident of Oregon, owned land in Oregon. Someone sued him in the Oregon courts and served notice on him by publication as provided by the Oregon stat-

utes. Neff did not appear and a personal judgment was rendered against him. His Oregon land was sold under execution to satisfy this judgment and Pennoyer bought it. Then Neff brought suit against Pennoyer for the land, claiming Oregon had no jurisdiction to render personal judgment against him, that all proceedings in the earlier suit were invalid and the execution sale conveyed no title.

The question presented was whether or not Oregon could by statute provide a method of service which could give its courts jurisdiction to render a personal judgment against an individual citizen of another state who was outside Oregon and did not appear.

We can write no argument which will equal the opinion of Mr. Justice Field. The opinion has been before this court too often to require further quotation. Suffice it to say that the opinion distinguishes between actions *in rem* and *in personam*, holds that personal judgments, since the adoption of the Fourteenth Amendment may be questioned as not due process of law unless the court has personal jurisdiction, and holds that personal jurisdiction requires appearance, consent, or personal service within the state.

We can conclude with Mr. Justice Field:

> "In the present case, there is no feature of this kind and, consequently, no consideration of what would be the effect of such legislation, in enforcing the contract of a non-resident, can arise. The question here respects only the validity of a money judgment rendered in one State, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein."

The states were glad enough to have a bad situation ended and *Pennoyer v. Neff* was followed by opinions in the various states adopting and following its doctrine.

Cabanne v. Graf, 87 Minn. 510.
Raher v. Raher, 150 Iowa 511.

are examples of such state court cases.

From time to time we forget the evils cured by the Fourteenth Amendment and some state seeks the special convenience and advantage of its own citizens and from time to time the Federal Courts must curb this tendency away from law toward disorder.

In considering the cases subsequent to *Pennoyer v. Neff* and dealing with the Fourteenth Amendment, we can eliminate two groups which our issues do not involve.

Cases wherein the defendant is a corporation are not relevant. The corporation is not a citizen and does not have the rights of a citizen. The corporation has no actual presence. Its presence can as well be presumed to attend its humblest employe as its highest official. Neither presumption will violate the rights of any citizen. Neither presumption will deny due process of law if reasonable effort is made to see that the process eventually gets to the Legal Department. The corporation has no right to do anything in any state save the state where it incorporated. Its exercising any function in any other state can properly be held to be a consent, to the extent of the function exercised, at least, to be subject to the jurisdiction of the state.

Henry L. Doherty has the rights of a citizen of New York and of the United States. He has an actual not a fictitious residence and presence in New York, and not in Iowa. He had a right to come into Iowa or to employ an Iowan as agent and the exercise of a right does not give rise to the presumed consent to anything.

Such cases as bear on this general subject but deal with corporate defendants have no part in considering the questions here at issue.

We omit another group of cases which deal with defendants who were present within the state when the cause of action arose and later left the state.

Hess v. Pawloski, 274 U. S. 352

is typical of this group of cases.

The opinion states and affirms every principle for which we contend and then because of the vital differences in the facts involved held Hess subject to the jurisdiction of Massachusetts.

Hess, a non-resident of Massachusetts, drove his automobile into Massachusetts and while there drove it upon the highways owned and maintained by that sovereign. While so driving he struck and injured Pawloski.

Hess while in Massachusetts was subject to the jurisdiction of Massachusetts. While using the highways owned and maintained by that sovereign, Hess was subject to such reasonable regulations and conditions as that sovereign imposed upon such use of its property.

Massachusetts had a statute whereby a non-resident, if he drove an automobile on state highways would be deemed to appoint the state registrar of automobiles his agent for purposes of service in any action growing out of any accident which might happen while he was driving on the highways.

We do not question the validity of such a statute.

> "The foundation of jurisdiction is physical power."
> *McDonald v. Mabee*, 243 U. S. 90.

Hess was within the borders of Massachusetts. That sovereign had the physical power to arrest him either before or after the accident. It had the power to compel him to either stay off the highways or agree to answer if he used the highways to the disaster of others.

"Ordinarily, jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within this jurisdition or not."

Michigan Trust Co. v. Ferry, 228 U. S. 346.

Massachusetts could have arrested Hess and held him in jail until process was served upon him. This was not necessary, the power of the state had already operated, a method of service had been secured, Hess could not change these facts by departing from the state.

The opinion clearly recognizes the automobile as a dangerous agency the use of which is subject to the special police powers of the state. Section 11079 of our Code does not purport to be a police power statute. It applies to every business than can be conducted by an agent. We think of no business not included.

Hess was in Massachusetts. Doherty never was in Iowa.

The Massachusetts statute required a consent to a certain manner of exercising its power in return for the use of its highways. Hess while subject to the jurisdiction of Massachusetts used its highways, and thereby gave the required consent. Doherty never used anything of Iowa's, never used anything in Iowa. Iowa could not require any consent from Doherty. Doherty never gave any consent.

The cases involving, presence, consent and later departure and effort to rescind consent, have no bearing on our issues.

Coming now to the cases which involve individual defendants who never were within the state, we find an oc-

casional effort to assert jurisdiction, all of which were thwarted by the courts.

In *Brooks v. Dun*, 51 Fed. 138, the court held invalid a Tennessee Statute substantially the same as our section 11079.

In *Ralya Market Co. v. Armour & Co.*, 102 Fed. 530, the court condemned this very section of the Iowa Code.

In *Mo[illegible]ck v. Kirby*, 118 Fed. 180, a similar statute of Kentucky was condemned. Kentucky did not acquiesce. Its Legislature amended its statute in an effort to avoid the effect of the court's decision and we hear more from it later.

New York Life Ins. Co. v. Dunlevy, 241 U. S. 518, does not present a statute seeking to bring a non-resident before a local court. In that case the original service was made within the state and the case went to final judgment. Garnishments were had to collect the judgment and the garnishee filed interpleader which was served on Mrs. Dunlevy after she had left the state.

This court said:

> "The established general rule is that any personal judgment which a state court may render against one who did not voluntarily submit to its jurisdiction and who is not a citizen of the state nor served with process within its borders, no matter what the mode of service, is void, because the court had no jurisdiction over his person."

and held Mrs. Dunlevy was not bound by the decision of the interpleader.

In the meantime the efforts of the Kentucky Legislature to avoid the decisions of the courts were bearing fruit. Kentucky had adopted a statute substantially the same as our 11079, and under it asserted personal jurisdiction over a citizen of Illinois. The result was:

Flexner v. Farson, 248 U. S. 289.

The opinion written by Mr. Justice Holmes, with every member of the court concurring, is very short. It condemns all statutes like 11079 when interpreted as Goodman claims Section 11079 should be interpreted. It condemns them not for this petty defect or for that petty defect. It condemns the whole fundamental theory that Goodman advances.

> "It is argued that the pleas tacitly admit that Washington Flexner was agent of the firms at the time of the transaction sued upon in Kentucky and the Kentucky statute is construed as purporting to make him agent to receive service in suits arising out of the business done in that state. On this construction, it is said that the defendants, by doing business in the state, consented to be bound by the service prescribed."

This is exactly the argument of Goodman; it is exactly the construction he puts on Section 11079; it is exactly the conclusion he asks this court to reach.

Mr. Justice Holmes briefly points out the reason for a different rule on corporations and holds that corporate defendants present no analogy, and then:

> "If the Kentucky statute purports to have the effect attributed to it, it can not have that effect in the present case."

The brevity and the scope of this opinion clearly indicates that this court considers that all points involved have been fully discussed in its earlier opinions and that the broad and general principles announced in *Pennoyer v. Neff* will be followed no matter what the form of service or statute may be. The man who is and always has been outside of a state is not personally subject to the jurisdiction of the state. Any statute, any service, which seeks to violate this fundamental principle is of no effect.

The text of Justice Story still stands unshaken, still protects the states from retaliation for their own selfishness, still protects the Union from friction between the states.

Respectfully submitted,

FRED W. LEHMANN, JR.,
WILLIAM B. HURLBURT,
HARRISON B. SPANGLER,
Counsel for Henry L. Doherty herein called Henry L. Doherty & Company, Appellant.

APPENDIX.

OPINION IN DAVIDSON VS. H. L. DOHERTY & CO., 214 IOWA 739.

Action by William S. Davidson against Henry L. Doherty & Company, which is the trade name of Henry L. Doherty, an individual, to recover the amount paid by plaintiff to defendant on the sale of shares of stock under an agreement which plaintiff alleges he has elected to rescind. Defendant appeared specially for the purpose of attacking the jurisdiction of the court. The plea to the jurisdiction under the special appearance was overruled. Defendant appeals.—Affirmed.

Deacon, Sargent, Spangler & Hutchinson and Lehmann, Hurlburt & Hossfeld, for appellant.

Brammer, Brody, Charlton & Parker, for appellee.

FAVILLE, J.—Henry L. Doherty is an individual and a resident of New York. He conducted business in this state under the trade name and style of Henry L. Doherty & Company. No question of a corporation or a partnership is involved in this case.

Appellant Henry L. Doherty had an office or agency in Des Moines, Polk County, Iowa, for the sale of shares of stock. It is alleged that on or about September 2, 1929, the appellant's agent in charge of said office or agency sold to the appellee certain shares of stock through said office or agency in Des Moines.

In this action the appellee seeks a personal judgment against appellant Henry L. Doherty for damages growing out of said sale of said shares of stock. On December 13, 1929, service of an original notice in proper form, duly addressed to appellant, was served on the said agent of appellant in Des Moines, Polk County, Iowa, which agent

was then in charge of the said office or agency through which the business involved in this litigation was transacted. Appellant entered a special appearance alleging that Henry L. Doherty is an individual and a non-resident of Iowa, and challenging the jurisdiction of the court over said appellant in this action *in personam*. The lower court held that it had jurisdiction of appellant in said action and entered an order accordingly.

I. Code section 11079 is as follows:

"When a corporation, company, or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

Service was made in this case in full compliance with this statute and under its express provisions.

It is contended that this statute is strictly a local statute, applicable only to residents of a county *in this state* who may be sued in some other county of the state under the circumstances set forth in the statute. In other words, it is contended that said statute is a venue statute applicable only to residents of Iowa. It is argued that not all non-residents of the state are residents of "any other county," as, for example, they may be residents of the District of Columbia or residents of Louisiana, where there are no counties. That question is, however, not involved in this appeal. Appellant did have an office or agency in another county than the one in which he resides. He comes within the very terms of the statute.

A similar contention was made in the early case of *Gross v. Nichols, Shepard & Co.*, 72 Iowa 239, where service on a foreign corporation having an office or agency in this state was involved. We said:

"The defendant contends, however, that the statute does not apply to a foreign corporation, but to a corporation residing in some other county of Iowa. This, it is contended, is implied from the words, 'any county other than that in which the principal resides'. But we do not think that the defendant's position can be sustained. There is nothing in the words used to prevent us from construing the section as meaning that service upon the principal may be made by service upon the agent, when the principal resides elsewhere than in the county of the agency. The courts, we think, have invariably put this construction upon the section, and we see no good reason to think it is not correct."

By its terms, and under our holding, the statute is applicable to residents of *"any other county"* than that in which the principal resides, whether such county be situated in Iowa or in some other state. In other words, the statute does apply to non-residents of Iowa who come within its terms and provisions, as well as to residents. Our construction of the statute has stood since 1887. We are not disposed to depart from it.

II. Does the statute apply to non-resident individuals?

This statute had its origin in the Code of 1851, and in substantially the same language has been the law of the state ever since. We have repeatedly held that jurisdiction can be obtained of foreign corporations maintaining an office or agency in this state, by service in the manner provided by this statute. *Locke v. Chicago Chronicle Co.*, 107 Iowa 390; *Moffitt v. Chicago Chronicle Co.*, 107 Iowa 407; *Bradshaw v. Des Moines Ins. Co.*, 154 Iowa 101; *Little v. Threshing Mch. Co.*, 166 Iowa 651; *Bell Jones Co. v. Erie R. R. Co.*, 168 Iowa 96, 97; *Morey v. Standard Sep. Co.*, 174 Iowa 530; *Pugh v. Bothne Co.*, 178 Iowa 601; *Duhigg v. Waterloo*

Gasoline Engine Co., 189 Iowa 547; *American Asphalt Roof Corp. v. Shankland*, 205 Iowa 862.

A somewhat similar statute when applied to a foreign corporation doing business within a state has been upheld by the Supreme Court of the United States. See *International Harvester Company of America v. Commonwealth of Kentucky*, 234 U. S. 579, 58 L. Ed. 1484.

By the very terms of the statute it is made applicable to individuals the same as to corporations. The legislative intent to make it so applicable is obvious. Such has been our construction of the statute. See *Gross v. Nichols, Shepard & Co., supra*, and *Murphy v. Development Co.*, 169 Iowa 542.

We adhere to our former holdings that the statute is applicable to individual non-residents who come within its express terms and provisions.

III. The question then arises as to whether or not said statute, when applied to non-resident individuals, violates the provisions of the Constitution of the United States.

It is fundamental that a state has no power to arbitrarily exclude an individual citizen of the United States from doing business within the state. Article IV, Section 2, of the United States Constitution provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states," and the XIV Amendment of said Constitution provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Even though a state may not exclude a citizen of another state from doing business therein, the Constitution does not prohibit a state from imposing reasonable conditions upon the citizen of a foreign state who seeks to do business within its borders, and this is especially so when like conditions are imposed upon its own citizens.

The statute in question does not in any manner abridge the privileges or immunities of citizens of the several states. It treats residents of Iowa exactly as it treats residents of all other states. The citizens of each state of the United States are, under this statute, entitled to all the privileges and immunities accorded citizens of this state.

The justice of such a statute is obvious. It places no greater or different burden upon the non-resident than upon the resident of this state. If a corporation, company, or individual resident in one county of this state maintains an office or agency in another county of the state, such corporation, company, or individual may be sued under this statute in the latter county in actions *in personam* that come within the terms of the statute. No good reason can be urged against the justice of a rule that makes such a statute applicable to the non-resident as well as the resident of the state. The latter may, under this statute, be compelled to defend a personal action in another county very far removed from the county of his residence. Why should not the resident who may live merely across a boundary line be equally required to defend in an action *in personam* in a county of this state where such non-resident maintains an office or agency as to matters growing out of such office or agency where proper service is had on the agent? A non-resident who gets all the benefit of the protection of the laws of this state with regard to the office or agency and the business so transacted ought to be amenable to the laws of the state as to transactions growing out of such business upon the same basis and conditions as govern residents of this state.

As is said by the Supreme Court of the United States in *Hess v. Pawloski*, 274 U. S. 352, 71 L. Ed. 1091, referring to the state statute there under consideration:

"It makes no hostile discrimination against non-resi-

dents, but tends to put them on the same footing as residents."

The opinion in *Kane v. New Jersey*, 61 L. Ed. 222, is pertinent to the question involved here. Kane was convicted of violating the statute of New Jersey which required all persons operating automobiles on the public highways of that state to have a license to do so, and to appoint the secretary of state as an authority upon whom processes may be served "in any action or legal proceeding caused by the operation of his registered motor vehicle within the state, against such owner." Kane was a non-resident. The Supreme Court of the United States held the statute to be valid and affirmed the conviction, and among other things said:

"It is not a discrimination against non-residents denying them equal protection of the law. On the contrary, it puts non-resident owners upon an equality with resident owners."

That is exactly what the statute under consideration does.

We hold that the statute does not abridge the privilege or immunities of the citizens of the United States, or deny to non-residents of Iowa equal protection of the law.

IV. Does the statute contravene the due process clause of the 14th Amendment to the Constitution of the United States?

The phrase "due process of law" has been construed by almost innumerable decisions, many of which may be found in Words and Phrases, first, second, and third series, under the caption, "Due process of law."

In *Simon v. Craft*, 45 L. Ed. 1165, the Supreme Court of the United States said:

"The essential elements of due process of law are notice and opportunity to defend. In determining whether such

rights were denied we are governed by the substance of things and not by mere form."

The court also said:

"But the due process clause of the 14th Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted, and an opportunity afforded to defend against it. *Louisville & N. R. Co. v. Schmidt*, 44 L. Ed. 747, * * * and cases cited."

See, also, *Dohany v. Rogers*, 281 U. S. 362, 74 L. Ed. 904; *Earle v. McVeigh*, 91 U. S. 503, 23 L. Ed. 398; *McDonald v. Mabee*, 243 U. S. 90, 61 L. Ed. 608.

We have repeatedly recognized this general rule. *State v. Miller*, 132 Iowa 587, 591; *Beebe v. Magoun*, 122 Iowa 94; *Kimball v. Board of Supervisors*, 190 Iowa 783, 793; *State v. Height*, 117 Iowa 650; *Jones v. Mould*, 151 Iowa 599; *Bennett v. Chicago Lbr. & Coal Co.*, 201 Iowa 770, 775; *Brenton v. Lewiston*, 204 Iowa 892, 895.

It is frequently stated as a general proposition that the processes of a state court do not extend beyond its borders and that a state can not in general obtain jurisdiction of a non-resident in an action *in personam* upless the defendant is served within the state or appears to the action. To this broad and general statement of the rule there are exceptions, as, for example, where "there is a waiver or a contract to the contrary." *Brenton v. Lewiston, supra; McConnell v. Poor*, 113 Iowa 133.

Another exception, or more properly speaking, a rule as to what constitutes due notice, is illustrated by the cases upholding statutes where a non-resident of a state, by carrying on certain lines of business or doing certain acts, as dealing in securities or driving an automobile on the public highways, is required, or presumed, to designate an officer or agent in said state upon whom service of notice may be

made in actions in said state growing out of the business or acts done. *Kane v. New Jersey, supra; Hess v. Pawloski,* 71 L. Ed. 1091.

Similarly, there are statutes such as the one under consideration, where a non-resident voluntarily comes within the state and establishes an office or agency and transacts business, and the service of summons is made by *substituted service* upon the agent of the defendant, and the action is one growing out of that office or agency.

Does such a statute meet the requirement of "notice and opportunity to defend?"

If notice on a public officer, such as a registrar or secretary of state, is sufficient in an action *in personam* against a non-resident, no good reason is apparent why a notice by like substituted service on a party's own agent in charge of his business in actions growing out of said business, should not be equally valid.

We considered this statute in the case of *Thornburg v. Bennett & Co.*, 206 Iowa 1187. In that case suit was brought in an action *in personam* against a partnership doing business in this state, by service on a purported agent of the partnership. We did not pass upon the constitutionality of the statute, but on the sufficiency of the return to show that the party upon whom service was made was "employed in the office of agency out of which the action grew or with which it was connected." In the discussion of the case we said:

" * * * the statute attacked is not discriminatory, as was the case of the statutes in the decisions relied upon by defendants, *Flexner v. Farson*, 268 Ill. 434-435 (109 N. E. 327); affirmed 248 U. S. 289 (63 L. Ed. 250); *Caldwell v. Armour*, 1 Penn. (Del.) 545 (43 Atl. 517); *Moredock v. Kirby*, 118 Fed. 180; *Andrews Bros. v. McClanahan*, 220 Ky. 504 (295 S. W. 457); *Cabanne v. Graf*, 87 Minn. 510 (92 N. W. 461)."

We quoted Section 11079, and said:

"Four things are under this statute, essential to the vality of such service. 1. The defendant must have an office or agency in the county. 2. It must be a county other than that in which he resides. 3. The action must grow out of or be connected with the business of that office or agency. 4. The agent or clerk upon whom service is made must be employed in such office or agency. *Barnabee v. Holmes*, 115 Iowa 581. As the service was not upon the partners, or any of them personally, and is *substituted service*, all of the elements essential under the statute to the authorization of such service must be shown." (Writer's italics.)

In the attack upon this statute reliance is placed upon the decision of the Supreme Court of the United States in *Pennoyer v. Neff*, 24 L. Ed. 565. That case involved consideration of a personal judgment obtained against a non-resident on service solely *by publication*. It was not a case of substituted service upon an agent as in the case at bar. In the *Pennoyer* case, the court, however, said:

"Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the state. As was said by the Court of Exchequer in *Vallee v. Dumergue*, 4 Exch., 290, 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal

proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them.'"

That is exactly what the statute under consideration does. It provides that a non-resident (as well as a resident), doing business in this state through an office or agency, is subject to actions *in personam* in this state as to such transactions *only* as grow out of said office or agency, and then only where substituted service is made on such agent. When a non-resident defendant establishes an office or agency for the transaction of business in any county in this state under this statute, he thereby voluntarily appoints his own agent, in charge of said office or agency, as one upon whom substituted service in actions *in personam*, growing out of that office or agency, may be made. Service of summons upon such duly appointed agent as to transactions growing out of such agency meets every essential requirement of due process of law.

Again, reliance is placed upon the decision of the Supreme Court of the *United States in Flexner v. Farson*, 248 U. S. 289, 63 L. Ed. 250, as announcing a different rule than the one we have indicated. It is important that we consider the facts in that case. The action was brought in the courts of Illinois upon a judgment obtained in the courts of Kentucky. The validity of the Kentucky judgment was involved. In the first place, it is to be noticed that *Flexner v. Farson* involved a partnership. It was sought to obtain judgment against the *individual partners* who were non-residents of the state, by service upon a purported agent of said *partnership*. It also appeared that the only person so served was *not* the agent of the partnership *at the time of service*. This was admitted by a demurrer. Furthermore, the statute involved applied only to non-residents of the state and not equally to residents. The case is not decisive of the case at bar.

In *Thornburg v. Bennett & Co., supra,* we said:

"To constitute due process, the agent on whom service is made must be such at the time of the service; for if he is not, he is under no duty to communicate notice to his principal, and there is no presumption that he would communicate."

In 1927, the Supreme Court of the United States decided *Hess v. Pawloski,* 71 L. Ed. 1091. This was a civil action for damages growing out of an automobile collision. The defendant was a resident of Pennsylvania. The injury occurred in Massachusetts. The court said:

"No personal service was made on him (defendant) and no property belonging to him was attached."

The service was made under a statute which expressly provided in effect that the use of the public highways by operating an automobile thereon by a non-resident shall of itself be deemed equivalent to the appointment by such non-resident of the registrar as his attorney, upon whom all lawful processes in any action growing out of any accident or collision might be made. The defendant appeared specially and moved to dismiss on the ground that the service on the registrar did not give jurisdiction over him for a judgment *in personam,* and that if the jurisdiction was sustained it would deprive him of his property *without due process of law.* The case was affirmed in the Supreme Judicial Court of Massachusetts in an able opinion by Chief Justice Rugg. See 250-255 Mass. 22, 144 N. E. 760. After trial below the case was again appealed to the Supreme Judicial Court of Massachusetts, and the second opinion appears in 149 N. E. 122. The Supreme Court of the United States said the question for their determination was "whether (this statute) * * * contravenes the *due process* clause of the Fourteenth Amendment."

The court recognizes the rule that:

"A state may not withhold from non-resident individuals the right of doing business therein. The privileges and im-

munities clause of the Constitution, sec. 2, art. 4, safeguards to the citizens of one state the right 'to pass through, or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise.' And it prohibits state legislation discriminating against citizens of other states."

The Supreme Court of the United States turned the decision of the case, not on any question of police power, nor on the privileges and immunities clause of the Federal Constitution, but squarely on the "due process" clause of the 14th Amendment. The case was a civil action for damages growing out of the operation of an automobile. Substituted service was had upon a designated officer who was, by virtue of the statute, made the agent of the defendant.

The court said:

"The measure in question operates to require a non-resident to answer for his conduct in the state where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved. It is required that he shall actually receive and receipt for notice of the service and a copy of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense. It makes no hostile discrimination against non-residents, but tends to put them on the same footing as residents."

Exactly so in the case at bar. To paraphrase from the opinion of the Supreme Court of the United States: Under our statute, the implied consent to be sued in this state is limited to proceedings growing out of the business transacted through the office or agency in this state. It is required that the agent shall actually receive a copy of the notice of suit and that it shall be read to him. (Code 11060). And it contemplates such continuances as may be found necessary to

give reasonable time and opportunity for defense. (Code, 11442, 11443, and 11059). It makes no hostile discrimination against non-residents, but actually puts them on the same footing as residents.

What difference is there, under the due process clause of the Federal Constitution, between an action for damages for personal injury and an action for damages for fraud in the sale of stock? Both are strictly actions *in personam* and arise at common law. If jurisdiction can be obtained in one by substituted service on an agent, certainly it can be in the other. If such service is due process of law in one instance it can not be anything else in the other. There is no question of police power in either case. It is strictly and solely a question of "due process of law."

In *Wuchter v. Pizzutti*, 72 L. Ed. 446, a suit was brought to recover for personal injuries caused by a non-resident defendant. Substituted service was made only on the registrar who, under the statute, was the legal officer upon whom service could be made. The due process clause was again invoked against the statute authorizing such substituted service. In sustaining the validity of the statute, Mr. Chief Justice Taft, after citing authorities, said:

"These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here."

Applying this test, the statute in question must be upheld as complying with the due process clause of the United States Constitution. The service is made on the agent *then* in actual charge of the agency. The action must grow out of the business of that very agency. Ample time is given the defendant to appear and defend; there is not only "reasonable probability" but practical moral certainty that the

defendant will receive actual notice of the pendency of the action.

It may be conceded that there are cases apparently holding to the contrary. Some of these arose under statutes very different from ours. In some of the statutes did not apply equally to residents and non-residents. Such cases do not assist us here. Neither are cases from state courts which were decided prior to the pronouncements of the Supreme Court of the United States in *Hess v. Pawloski, supra,* and *Wuchter v. Pizzutti, supra,* of persuasive force.

We deem it proper to cite a few of the cases that recognize that such a statute meets the requirement of "due process of law."

In *Rauber v. Whitney,* 25 N. E. (Ind.) 186, the Supreme Court of Indiana considered a statute almost identical in language (and clearly so in effect) with ours. The defendants were non-residents. Substituted service was made on their agent in an action growing out of the agency. The court said:

"It appears by the answer to the plea in abatement that the appellees had a store in the town of Tipton, in Tipton County, in this state, where the action was commenced; that the cause of action grew out of and was connected with the business of the appellees in that county; and that process was served upon the agents of the appellees in that county in charge of their said business. This conferred jurisdiction on the circuit court of Tipton county, and for that reason the ruling of the circuit court was erroneous."

The trial court had denied jurisdiction.

See, also, *Edwards v. Van Cleave,* 94 N. E. (Ind.) 596; *Ft. Wayne Ins. Co. v. Irwin,* 54 N. E. (Ind.) 817; *Conkey v. Conder,* 37 N. E. (Ind.) 132.

In *Guenther v. American Steel Hoop Co.,* 76 S. W. (Ky.) 419, the Court of Appeals of Kentucky pointed out the distinction between *constructive* service of process and *substi-*

tuted service such as we have in this case. The court said:

"The general rule is that substituted service of process is equivalent to personal service, and warrants a personal judgment, if made in the manner pointed out by the statute, on the ground that the defendant is presumed to have received the notice."

See, also, *Green v. Snyder*, 84 S. W. 808 (Tenn.); *Moore v. Payne*, 35 Fed. (2d) 232; *Cohen v. Plutschak*, 40 Fed. (2d) 727; *Rubin v. Goldberg*, 154 Atl. 535 (N. J.); *Shushereba v. Ames*, 255 N. Y. 490, 175 N. E. 187; *Schilling v. Odlebak*, 177 Minn. 90, 224 N. W. 694; *Seitz v. Claybourne*, 231 N. W. 714 (Minn.); *Yarborough v. N. C. Park Com'n.*, 145 S. E. 563 (N. C.).

The true rule in cases of the kind is laid down by the American Law Institute, in the Restatement of the Conflict of Laws, section 90, as follows:

"A state can exercise through its courts jurisdiction over an individual who has done an act or caused an event within the state, as to a cause of action arising out of such act or event, if by the law of the state at the time when the act was done a person by doing the act or causing the event subjects himself to the jurisdiction of the state as to such cause of action."

The statute in question comes squarely within the provisions of this rule. It does not conflict with any provision of the Federal Constitution. Under the record in this case the court obtained jurisdiction over the appellant in the precise manner pointed out by the statute. The statute does not (1) deny to the defendant any rights or immunities granted to citizens of this state; (2) it does not deny to the defendant the equal protection of the law, because it applies equally to residents and non-residents; (3) it does not deny to the defendant due process of law, because it provides for a substituted service upon the existing agent of the defendant in charge of the defendant's office or agency, and is limited to

matters growing out of that agency, and there is "every reasonable probability" that such notice so served will necessarily be brought to the attention of the defendant and afford him ample opportunity to defend. Therefore the statute does not contravene any of the provisions of the Federal Constitution.

It follows that the order of the trial court must be—Affirmed.

EVANS, STEVENS, DEGRAFF, AND ALBERT, JJ., concur.

MORLING, J. (dissenting)—Plaintiff's petition alleges "that defendant is a trade name under which Henry L. Doherty is doing business through his agents and representatives from his office in Des Moines, Iowa;" that September 2, 1929, plaintiff entered into an agreement to purchase 10 shares of stock, which was within the provisions of the securities law; that defendant was engaged in business in the State as a dealer or salesman of securities not exempt under the securities law, but was not registered in the office of the Secretary of State as provided by that law; that November 29, 1929, plaintiff elected to rescind and made tender. He asks judgment for the amount paid on the contract. Service of original notice was made first on E. A. King as an agent and clerk employed in defendant's office in Des Moines. Later service was made on the Secretary of State. Defendant entered special appearance and amendments, duly verified and uncontradicted, showing that Henry L. Doherty & Company is not a corporation or partnership, is an individual, a resident and citizen of New York, at no time material to this controversy a citizen or resident of or within the state of Iowa; that E. A. King has never represented defendant for the purpose of personal service; that defendant never appointed any person his agent for the purpose of being served with original notice of any suit in any court of Iowa save only suits arising out of transactions had under permits

issued by the State; that no original notice had been served upon defendant. Plaintiff called King as witness, who testified to the effect that the office of Henry L. Doherty & Company in Des Moines was opened on January 1, 1926; "that the office of Henry L. Doherty & Company in Des Moines sold on September 2, 1929, 10 shares of Cities Service common stock to the plaintiff; that he was employed in such office at the time of service on him as district manager of Henry L. Doherty & Company in the State; that Henry L. Doherty is not a resident of Polk County; is a resident of New York City, has not been in Iowa since the witness came to the Des Moines agency."

The evidence shows that on July 29, 1929, the Secretary of State received defendant's application under the securities law as a dealer accompanied by defendant's signed consent that "actions growing out of the violation of any provision or provisions of the 'Iowa Securities law' may be commenced against it, the said Henry L. Doherty & Company, in the proper court of any county * * * by the service of any process or pleading authorized by the laws of the State of Iowa on the Secretary of State * * * as valid and binding as if due service had been made upon the dealer direct." The papers are dated June 21, 1929, marked by the Secretary of State as received July 29, 1929, and "filed 9-27-1929." The Secretary of State issued permit dated September 27, 1929. The delay in marking the papers filed and in granting application is not explained.

As the sufficiency of the service is thus attacked at the beginning the burden is upon the plaintiff to sustain it. *Thornburg v. James E. Bennett & Co.*, 206 Iowa 1187.

The question is not what the Federal Constitution and the law ought to be but what they are. This question is not one of the convenience of the citizens of any one state but of the constitutional rights of all citizens of the United States, those

of citizens of Iowa in other states as well as those of citizens of other states in Iowa.

In *New York Life Ins. Co. v. Dunlevy*, 241 U. S. 518, 522, 523, 60 L. Ed. 1140, 1143, 36 Supreme Court Reporter 613, cited in *Flexner v. Farson*, 248 U. S. 289, 63 L. Ed. 250, as the basis of the decision there rendered it is declared:

"The established general rule is that any personal judgment which a state court may render against one who did not voluntarily submit to its jurisdiction, and who is not a citizen of the state, nor served with process within its borders, no matter what the mode of service, is void, because the court had no jurisdiction over his person." *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, *Goldey v. Morning News*, 156 U. S. 518, 521, 39 L. Ed. 517, 518; *New Mexico ex rel. Caledonia Co. v. Baker*, 196 U. S. 432, 444, 49 L. Ed. 540, 545; *Mexican Central Ry. Co. v. Pinkney*, 149 U. S. 194, 209, 37 L. Ed. 569-699, 705; *Pennsylvania F. Ins. Co. v. Gold Issue M. & M. Co.*, 61 L. Ed. 610, 243 U. S. 93; *Rea v. Rea*, 123 Iowa 241; *Raher v. Raher*, 150 Iowa 511; *Pond v. Simpson*, (Mass.) 146 N. E. 684; *Redzina v. Provident Inst. for Savings* (N. J.) 125 Atl. 133.

Without such service the court may not render a personal judgment even though it is proposed to restrict its effect and enforcement to the state and to give it no extraterritorial effect. *Riverside & D. R. C. Mills v. Menefee*, 237 U. S. 189, 59 L. Ed. 910; *Freeman v. Alderson*, 119 U. S. 185, 30 L. Ed. 372.

We have presented here for determination not a question of discrimination in favor of citizens of the state against the citizens of other states or denial of the equal protection of the laws. We have presented solely the question of jurisdiction of the person of a citizen of another state not found and served with process within this state. The laws of the state and the process issued by its courts have no force outside of its boundaries. The state can exercise no power

over the person of an individual citizen of another state without his consent unless it finds him within the territory over which it has jurisdiction.

By the rendition of the judgment asked for by the plaintiff the state through its courts would be exercising power over the person of a citizen of another state who owes it no allegiance, not found here and not consenting thereto. (See *Blackmer v. United States*, 284 U. S. 421.)

Defendant is an individual and a citizen of another state of the United States. By section 2, Article 4 of the Federal Constitution, "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several state." Under this provision the defendant has the constitutional right to free ingress and egress into and from the state of Iowa and to freely engage in lawful business within the state. *Paul v. Virginia*, 8 Wall. 168, 180; *Ward v. Maryland*, 12 Wall. 418, 430; *United States v. Wheeler*, 254 U. S. 281, 65 L. Ed. 270.

"A state may not withhold from non-resident individuals the right of doing business therein." *Hess v. Pawloski*, 274 U. S. 352, 355, 71 L. Ed. 1091, 1092. The state of Iowa has no power to exclude defendant from doing business in Iowa or to prescribe conditions upon which he may be admitted to do business in the state. *Flexner v. Farson*, 248 U. S. 289, 63 L. Ed. 250.

Flexner v. Farson was an action upon a judgment rendered by a Kentucky court. The declaration alleged "that the transaction in respect of which the judgment was rendered took place at Louisville, Kentucky, and that at that time the defendants were doing business there as partners through Washington Flexner, who was and continued to be their agent. * * * That the defendants were non-residents and that the service of summons of the Kentucky suit was made upon Washington Flexner in accordance with a Kentucky statute," which declared:

"In actions against an individual residing in another state, or a partnership, association or joint-stock company, the members of which reside in another state, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action occurred."

Defendant (one of the partners) "pleaded that the defendants in the former suit did not reside in Kentucky, were not served with process, and did not appear; that Washington Flexner was not their agent at the time of service upon him."

It is true that plaintiff demurred to this plea, but neither the Supreme Court of Illinois (109 N. E. 327) nor the Supreme Court of the United States held, or assumed, that Washington Flexner was not the agent of the defendant upon whom service might legally be made under the Kentucky statute. On the contrary, the Kentucky court had necessarily upheld the service and the statute under which it was made. On the only question discussed by the Supreme Court of the United States the Court said:

"There was an appeal to the Supreme Court of the State on the ground that the court below did not give full faith and credit to the Kentucky judgment and erred in holding the Kentucky statute as to service unconstitutional. The Supreme Court affirmed the judgment below. 268 Ill. 435. The same errors are alleged here.

"It is argued that the pleas tacitly admit that Washington Flexner was agent of the firm at the time of the transaction sued upon in Kentucky, and the Kentucky statute is construed as purporting to make him agent to receive service in suits arising out of the business done in that state. On this construction it is said that the defendants, by doing business in the state, consented to be bound by the service prescribed. The analogy of suits against insurance

companies based upon such service is invoked. *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147. But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the states could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. *Lafayette Ins. Co. v. French*, 18 How. 404, *Pennsylvania F. Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U. S. 93, 96. The state had no power to exclude the defendants, and on that ground, without going farther, the supreme court of Illinois rightly held that the analogy failed, and that the Kentucky judgment was void. If the Kentucky statute purports to have the effect attributed to it, it cannot have that effect in the present case. *New York Life Ins. Co. v. Dunlevy*, 241 U. S. 518, 522, 523."

The Supreme Court of Illinois (109 N. E. 327) decided that "the statute in question, so far as it applies to personal service upon individuals or partnerships in this State (Illinois) must be held unconstitutional." This was the only federal question presented.

It seems to me clear that *Flexner v. Farson* decided that the state had no power to exclude the individual defendant from doing business within it; that the individual defendant by exercising his constitutional right to do business within the state did not consent to be bound, and was not bound, by a statute permitting service on an agent in charge of the business; that the state might exclude a foreign corporation altogether and therefore could prescribe that by doing business in the state a foreign corporation consented to be bound by the service on the agent, but that there was no analogy in such cases between suits against foreign corporations and suits against individual citizens of other states.

Foreign corporations may be wholly excluded from doing business within the state, or may be admitted upon such terms as the state sees fit to impose, among which may be

expressly or by implication a condition that the corporation consent to the service of process in the manner prescribed by the state statute, (*Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964; *Pennsylvania Co. v. Gold Issue Co.*, 243 U. S. 93, 61 L. ed. 610), provided, of course, that the service so prescribed be such as to give reasonable notice and opportunity to appear and be heard before default may be taken. *Riverside etc. Co. v. Menefee*, 237 U. S. 189, 59 L. ed. 910; *Wuchter v. Pizzutti*, 276 U. S. 13, 72 L. ed. 446; *Wildes v. Lou Dillon Etc. Co.*, (Nev.) 170 Pac. 1046; *King Tonopah Mining Co. v. Lynch*, 232, Fed. 485.

But even a corporation may not as a condition to doing business in the State be required to surrender a right or privilege secured by the federal constitution and laws. *Southern Pacific Co. v. Denton*, 146 U. S. 202, 37 L Ed. 942; *United States v. Chicago etc. Co.*, 282 U. S. 311, 75 L. ed. 359; *Terrill v. Burke etc. Co.*, 257 U. S. 52, 66 L. ed. 352; *Union Telegraph Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355.

A corporation can act only through agents. Service of process upon it must be made upon an agent, but it is essential to the validity of service of process within the State upon a foreign corporation in an action *in personam* that the corporation be within the State by transacting business there. *Peoples Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 62 L. ed. 587; *Rosenberg v. Curtis-Brown Co.*, 260 U. S. 516, 67 L. ed. 372; *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 L. ed. 1479; *St Louis etc. Co. v. Alexander*, 227 U. S. 218, 57 L. ed. 486; *Chipman v. Jeffery Co.*, 250 U. S. 373, 64 L. ed. 314; *Philadelphia etc. Co. v. McKibbin*, 243 U. S. 264, 61 L. ed. 262; *Chase Bag Co. v. Hunson Steamship Co.*, 295 Fed. 990; *American Asphalt Roofing Corporation v. Shankland*, 205 Iowa 862; *Kalbach v. Service Station Co.*, 207 Iowa 1077, 1079.

If it transacts business in the State it is there as an artificial body. *Id.* It is not sufficient merely that one who

occupies an office, or holds an agency for the corporation is personally within the State and there served. The corporation itself must be in the State transacting business there.

The Supreme Court of the United States has itself put the foregoing construction upon *Flexner v. Farson.*

In *Hess v. Pawloski,* 274 U. S. 352, 71 L. ed. 1091, the statute involved was a motor vehicle law, which provided:

"The acceptance by a non-resident of the rights and privileges conferred by Section 3 or 4, as evidenced by his operating a motor vehicle thereunder, or the operation by a non-resident of a motor vehicle on a public way in the commonwealth other than under said sections, shall be deemed equivalent to an appointment by such a non-resident of the registrar or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved while operating a motor vehicle on such a way, and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally. * * *"

The court said:

"The process of a court of one state cannot run into another and summon a party there domiciled to respond to proceedings against him. Notice sent outside the state to a non-resident is unavailing to give jurisdiction in an action against him personally for money recovery. *Pennoyer v. Neff,* 95 U. S. 714, 24 L. ed. 565. There must be actual service within the state of notice upon him or upon some one authorized to accept service for him. *Goldey v. Morning News,* 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559. A personal judgment rendered against a non-resident who has neither been served with process nor appeared in the suit is without validity. *McDonald v. Mabee,* 243 U. S.

90, 61 L. ed. 608, L. R. A. 1917F, 458, 37 Sup. Ct. Rep. 343. The mere transaction of business in a state by non-resident natural persons does not imply consent to be bound by the process of its courts. *Flexner v. Farson*, 248 U. S. 289, 63 L. ed. 250, 39 Sup. Ct. Rep. 97. The power of a state to exclude foreign corporations, although not absolute but qualified, is the ground on which such an implication is supported as to them. *Pennsylvania Fire Ins. Co. v. Gold Issue Min. Co.*, 243 U. S. 93, 96, 61 L. ed. 610, 616, 37 Sup. Ct. Rep. 344. But a state may not withhold from non-resident individuals the right of doing business therein. The privileges and immunities clause of the constitution, section 2, art. 4, safeguards to the citizens of one state the right to 'pass through, or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise.' And it prohibits state legislation discriminating against citizens of other states. *Cornfield v. Coryell*, 4 Wash. C. C. 371, 381, Fed. Cas. No. 3,230; *Ward v. Maryland*, 12 Wall. 418, 430, 20 L. Ed. 449, 452; *Paul v. Virginia*, 8 Wall. 168, 190, 19 L. ed. 357, 360.

Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the state where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved. It is required that he shall actually receive and receipt for notice of the service and a copy of the process. And it con-

templates such continuances as may be found necessary to give reasonable time and opportunity for defense."

The opinion further holds that the statute makes no hostile discrimination against non-residents. (None is made under our statute and the equal protection clause is not here involved.) The court then proceeds:

"The state's power to regulate the use of its highways extends to their use by non-residents as well as by residents. *Henrick v. Maryland,* 235 U. S. 610 * * * And, in advance of the operation of a motor vehicle on its highway by a non-resident, the state may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use. *Kane v. New Jersey,* 242 U. S. 160, 167, 61 L. ed. 222, 226, 37 Supreme Court Reporter 30. That case recognizes the power of the state to exclude a non-resident until the formal appointment is made. And, having the power so to exclude the state may declare that the use of the highway by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served * * * The difference between the formal and implied appointment is not substantial so far as concerns the application of due process clause of the Fourteenth Amendment."

It seems to me that *Hess v. Pawloski,* (274 U. S. 452,) *Henrick v. Maryland,* (235 U. S. 610,) *Kane v. New Jersey,* (242 U. S. 160) hold that the State has the right to exact compensation for the use of the highways which it improves and maintains; that in the interest of safety and in execution of the police power it has power to regulate the use of its highways by motor vehicles; that its regulations may include a requirement for taking out licenses; that it may make such regulations applicable to citizens of other states as well as to its own citizens; that it has power to exclude from the use of the highways citizens of other states as well as its own citizens unless and until they conform to such regulations;

that as it may exclude citizens of other states from the use of its highways for motor vehicle traffic unless and until they comply with such regulations it may, in order to efficiently secure and facilitate enforcement and remedial action, require non-residents to consent to the jurisdiction of its courts and to service of process upon a designated official as their agent in a manner calculated to give reasonable notice and opportunity to be heard in all actions growing out of the non-observance of such regulations or out of accidents occurring in the exercise of such privilege in use of its highways; that it may require express consent or provide that the acceptance of its hospitality or the voluntary use of its highways by non-residents shall conclusively imply consent.

In such cases the State has the power to exclude until the appointment is made or consent given. It, therefore, has the right to declare the use of the highways equivalent to appointment.

But the State has no power to exclude citizens of other states from transacting business within the State, and no power to exact from them as condition to doing business in the State submission to the jurisdiction of the courts of the State when not found within it. In the enactment in 1851 of the law as now found in Section 11079, and in the continuance of that law on the statute book, the legislature, it seems to me, never had in view license laws such as that involved in the present case enacted three-fourths of a century later. As will be presently shown that law was and is merely a practice act relating to all businesses. The legislature has not provided, either by that law or by any other, that the transaction of business in general or the sale of securities in particular within the State shall operate as an implied consent to the service of notice within the State "on any agent or clerk employed in such office or agency * * *" The legislature has not provided that the sale of securities within the State by non-residents shall operate as consent to any

form of service, not even to service upon the Secretary of State. It has merely provided that one who seeks a license shall, as a prerequisite to obtaining it, file with the application consent to service on the Secretary of State. Code Sections 8581c9-8581c11. I will recur to this subject later.

Plaintiff seeks to uphold the applicability of Section 11079 to non-residents as an exercise of the police power. The statute in its original enactment is found in Chapter 101, (Section 1705) of the Code of 1851 entitled "The Place of Bringing Suit", which provides:

"When a corporation, company or individual has an office or agency in any county for the transaction of business any suits growing out of or connected with the business of that office or agency may be brought in the county where such office or agency is located as though the principal resided therein and service on any agent or clerk employed in such office or agency shall be sufficient service upon the principal."

In the civil practice act of 1860 the section was divided into two parts, the first of which Revision 1860, Section 2801, in Chapter 118 entitled "Place of Bringing Suit" is identical with Section 1705 to and including the words "Where such office or agency is located." By Section 2827, which is in Chapter 120, entitled "The Manner of Commencing Actions" it is provided that "When a corporation, company, or individual has for the transaction of any business an office or agency in any county other than that in which the principal resides service may be made on any agent or clerk employed in such office or agency in all actions growing out of or connected with the business of that office or agency." These sections have been retained in the subsequent codes under the same titles.

The statute originally was one regulating venue and authorizing in the particular case, and under particular circumstances, designated service on any agent or clerk em-

ployed in the designated office or agency. The statute applied, and still applies, to all businesses and in its broad language to all corporations, companies or individuals transacting any business. It was passed long before and without reference to the securities law or any police measure. The purpose of the statute neither as expressed or implied is to regulate the conduct of any business by non-residents within the State, or to extend the jurisdiction of the State courts *in personam* to non-residents not served in Iowa. By this statute the legislature has not undertaken, either by express language or by implication, to exclude any non-resident from doing business within the State or to prescribe the terms upon which he may transact business within the State. The statute does not purport to require non-residents to appoint agents within the State to receive service of process. The Statute in its original form, and as now found in component sections, is a practice act regulating venue and method of service. It is not an enactment in execution of nor has it ever been intended as an exercise of the police power.

Nor can it be construed as enacting that the transaction of business within the State by an individual citizen of another state shall operate as submission to the jurisdiction of the courts of the State by service "on any agent or clerk employed" in his office or agency within the State.

As is said in *Hess v. Pawloski*, 274 U. S. 355:

"The mere transaction of business in a state by non-resident natural persons does not imply consent to be bound by the process of its courts."

Moreover, the agency of one upon whom service is made must be such as to render it fairly reasonable and just to imply an authority on the part of the agent to receive service. *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602, 617, 43 L. ed. 569, 574; *Commercial Mut. Acc. Co. v. Davis*, 213

U. S. 245, 255, 53 L. ed. 782, 787; *Philadelphia Etc. Co. v. McKibbin*, 243 U. S. 264, 61 L. ed. 710.

The agent must be one who may fairly be presumed to have the duty of communicating to his principal the fact of service. *St. Clair v. Cox*, 27 L. ed. 222; *King Tonopah Min. Co. v. Lynch*, 232 Fed. 485, 496; *Strain v. Portrait Co.*, 126 Fed. 831.

While the last two lists of cases involved foreign corporations the requirements with respect to service therein made are requirements of due process and must be as applicable to non-resident individuals as to foreign corporations. It is the "character and power of the one served as an agent" that is the "test of the right to acquire jurisdiction." *Riverside etc. Co. v. Menefee*, 237 U. S. 189, 59 L Ed. 910-913.

There is no requirement in Section 11079 that the person served, or anyone else, transmit the notice to the principal, or that the service be upon one who possesses any authority or is under any duty with respect to the receipt or service or the transmission of the notice to the principal. It is not even required that the agent or clerk be one employed in the particular transaction. There is no requirement from which it may be deduced that the service must be such as is likely to come to the attention of the principal. A number of insurance companies for instance, might employ a common agency having many clerks. It matters now how limited the duties and employment of the clerk may be, or how unlikely for various reasons service upon him would be brought to the knowledge of the principal still by the statute service of notice upon him would require the principal to appear and defend. It is essential to the validity of the statute providing for judgment *in personam* on substituted or constructive service that it make such provision for the probable communication of actual notice to defendant as reasonably to enable him to

appear and be heard before he may be defaulted. *Wuchter v. Pizzutti*, 276 U. S. 13, 72 L. ed. 446; *Blackmer v. United States*, 76 Law ed....; *Wildes v. Lou Dillon, etc. Co.*, (Nev.) 170 Pac. 1046; *Kink Tonopah Min. Co. v. Lynch*, 232 Fed. 485.

This action is in a municipal court. The service was within the county. By Section 10668 the defendant may be required to appear and answer in five days. (In the district court appearance may be required after ten days.) Section 11059.

Though the clerk may be wholly without duty or authority in the matter his delay or inattention, especially in the case of a principal residing at a long distance from the State, might very easily result in default being taken before the principal has any knowledge of the action. The statute must prescribe reasonable time, taking into consideration the possibility of accidental delays. *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520.

It is not sufficient that in the exercise of discretion reasonable time may be given or that default judgment may be set aside for insufficient notice. *Roller v. Holly*, 176 U S. 398.

The constitutional validity of a law is to be tested not by what has been done under it but what may by its authority (rightfully) be done. *Stuart v. Palmer*, 74 N. Y. 183, 188; *Montana Co. v. St. Louis Mining & Milling Co.*, 152 U. S. 160; *Wachter v. Pizzutti*, 276 U. S. 13, 24, 72 L. ed. 446; *Burtch v. Zeuch*, 200 Iowa, 49, 55; *Boise-Payette Lumber Co. v. Challis Independent Dist.* (Idaho) 268 Pac. 26; 6 R. C. L. 82; 12 C. J. 786 1228.

It seems to me that Section 11079 if applied to individual citizens of other states exercising their constitutional right to transact lawful business within the State would be unconstitutional under the uniform decision of the courts. *Cabanne v. Graf*, 92 N. W. 461, 59 L. R. A. 735; *Caldwell v.*

Armour, (Del.) 43 Atl. 517; *Murdock v. Kirby*, 118 Fed. 180. And that since *Flexner v. Farson* was decided the interpretation which I have given to it has been uniformly placed upon it by the courts. *Andrew v. McClanahan*, 295 S. W. 457; *Knox Brothers v. E. W. Wagner & Co.*, 209 S. W. 638. See further also *Joel v. Bennett*, (Ill.) 115 N. E. 6; *Frolich v. Hanson*, (Tenn.) 296 S. W. 353; *Aikman v. Sanderson*, (La.) 47 So. 600.

In *Murphy v. Development Co.*, 169 Iowa 542, the constitutionality of the statute as there applied to an individual non-resident was not considered. It seems to me, therefore, that case in this regard should be overruled. While in *Thornburg v. James E. Bennett & Co.*, 206 Iowa 1187, we said that Section 11079 was not discriminatory we expressly withheld from discussion or adjudication the question now under consideration.

To avoid misapprehension I may add that the object of this suit is not to determine the rights of, or to subject property within the state, or to determine the status of citizens of the State. The action is exclusively *in personam*. I may also say that in as much as we have held that a partnership for purposes of venue (*Fitzgerald v. Grimmell*, 64 Iowa 261), and for purpose of attachment, (*Ruthven v. Beckwith*, 84 Iowa 715; *Brumwell v. Stebbins*, 83 Iowa 425, 238,) and for purpose of judgment, (*Lansing v. Bever Land Co.*, 158 Iowa 693,) as well as for other purposes (*Lutz v. Billick*, 172 Iowa 543; *Jensen v. Wiersma*, 185 Iowa 551; *National Sewer Pipe Co. v. Smith-Jaycox Co.*, 183 Iowa 17; *Thornburg v. James E. Bennett & Co.*, 206 Iowa 1187,) is a legal entity distinct from its individual members. I do not wish to be understood as expressing any opinion upon the validity as to a partnership of the statute under consideration.

If it is suggested that the constitutional right of a citizen of one state to transact business in another state is limited to the transaction of lawful business it is to be said that the

defendant does not admit, nor does the evidence show that the plaintiff was engaged in the transaction of an unlawful business. It may be admitted that the securities law is a proper enactment in the exercise of the police power. *Merrick v. N. W. Halsey & Co.*, 242 U. S. 566, 61 L. ed. 498. Plaintiff's showing at most is that defendant's license was not in effect at the time of the alleged sale to plaintiff. See *State v. Gish*, 168 Iowa 70. It is the substance of plaintiff's alleged cause of action that defendant was not licensed at the time of the sale in question and that therefore the sale was in violation of the statute. This is the very matter upon which the defendant is entitled to be heard. He may be condemned on that allegation only if the court has jurisdiction of his person. To hold that the business transacted by defendant within the State was unlawful, and because it was unlawful he was not in making the sale in controversy (if it was made, which is still to be decided) "entitled to all privileges and immunities of citizens of the several states," is to hold in advance of hearing that plaintiff has a cause of action against defendant for transacting an unlawful business and that the court has jurisdiction because the plaintiff has such cause of action—that is, the court has jurisdiction because plaintiff pleads a good cause of action for sale of property or conducting business within the State in violation of law.

In as much as the majority contends nothing for the service upon the Secretary of State it is necessary to add but little to what has been said with reference to that service. Plaintiff's position necessarily is that the application for permit and consent to service of process and the permit granted upon them after the sale did not relate back to the sale and do not protect defendant in making the sale. See 37 C. J. 244; *State v. Gish*, 168 Iowa 70.

Plaintiff at this point is in the position of seeking to take advantage of what the defendant had done so far as it is

to plaintiff's advantage in this action but denying its efficacy so far as it would protect defendant in making the sale. Plaintiff contends that defendant's consent to service of process is not "limited to causes of action arising subsequent to the appointment of the Secretary of State as his agent on whom notice of suit can be served. The language of the statute is broad and sweeping, and not only contemplates causes of action arising subsequent to the time the license complied with the law, but also contemplates causes of action arising subsequent to the time the licensee should have complied with the law."

Defendant's signature to the consent was affixed not as a final and unconditional execution of it but as a part of the process of procuring permit. The deposit of the consent with the Secretary of State was tenative, and impliedly conditional on the issuance of permit. The consent was not general or unlimited; it was not to service on the Secretary of State in any action or any cause but was limited to actions "growing out of the violation of any provision" of the securities law. Neither the State nor defendant contemplated by this consent the violation of the law by selling securities before permit issued or the institution of suits founded on sales without the permit which was being applied for. The consent was not intended by either the State of defendant to become effective unless and until it was accepted and the defendant was permitted to sell securities under it. The terms of the application and consent had reference to the anticipated issuance of permit and to compliance with the permit. Plaintiff does not claim to have relied upon, or to have been misled by the proceedings preliminary to the granting of the permit, but on the contrary is asserting, by implication at least, that such preliminary proceedings are as to his right to recover of no effect. If they were of no effect for the purpose for which they were intended, namely, the securing to defend-

ant of right to make the sale, they are of no effect for a purpose for which they were not intended, the plaintiff's alleged right of action founded on their failure to effect that purpose. Plaintiff is denying the efficacy of the consent at the time of its execution, and denying the retroactive operation of the permit, precludes himself from asserting the efficacy of the consent as an invitation to secure jurisdiction by service in accordance with it. Plaintiff's claim to estoppel based upon the alleged execution of the consent is unfounded.

Plaintiff relies on *Wait v. Morrison*, 281 Pac. 906, which was an action against a foreign corporation for damages sustained from a collision with defendant's automobile. The statute of Kansas required foreign corporations seeking to do business in the State to make application for authority accompanied with "written consent of the corporation, irrevocable, that actions may be commenced against it in the proper court of any county in this State in which a cause of action may arise or in which the plaintiff may reside * * *" The court said:

"The statute is broad enough to cover any action, whether the right to prosecute it had accrued before or after the defendant had complied with section 17-501. An action on a promissory note, due before consent to service was given and held by a citizen of this state, ought to be maintained under that statute. The statute is broad enough to embrace such an action."

That was the case of a foreign corporation asking for authority to do business in the state and required by statute as a prerequisite to the granting of the consent that service in any action against the corporation for whatever cause be filed. Plaintiff there was not, as he is here, denying the authority of defendant to transact business in the State as the very basis of his action.

It, therefore, seems to me that in the rendition of the judgment asked the court would attempt to exercise jurisdiction over a citizen of another state not found in this State and not consenting to the jurisdiction of the courts of this State, on substituted service based upon an interpretation of a statute which under the federal statute would render the statute void, or on service based on a consent not given or accepted as applicable to actions of this character. I think the order should be reversed.

WAGNER, C. J.

KINDIG & GRIMM J J Concur in this Dissent.

18

FILE COPY

Office Supreme Court, U. S.
FILED
JAN 28 1935
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1934.

No. 469

HENRY L. DOHERTY & COMPANY, *Appellant*,

vs.

FRANK GOODMAN, *Appellee*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

REPLY BRIEF.

FRED W. LEHMANN, JR.,
WILLIAM B. HURLBURT,
HARRISON E. SPANGLER,
Attorneys for Appellant.

Supreme Court of the United States

OCTOBER TERM 1934.

No. 469

HENRY L. DOHERTY & COMPANY, *Appellant,*

vs.

FRANK GOODMAN, *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

REPLY BRIEF.

SUBJECT INDEX.

	Page
Flexner vs. Farson, Hess vs. Pawloski and the present case	2
1. Presence of defendant	3
2. General or police power statute	3
3. Constitutional rights and special privileges as basis for implied consent	6
4. Provisions for actual receipt of notice	7
5. Time to appear and defend	7

TABLE OF CASES.

Flexner vs. Farson, 248 U. S. 289	2
Hess vs. Pawloski, 274 U. S. 352	2
Pennoyer vs. Neff, 95 U. S. 714	2

STATUTES.

Iowa Code of 1931, Section 11059	7

REPLY BRIEF.

This appellant relies upon the principles announced in the line of cases shaped by *Pennoyer vs. Neff*, 95 U. S. 714, and culminating in *Flexner vs. Farson*, 248 U. S. 289. The appellee relies upon the branch of this same line of cases culminating in *Hess vs. Pawloski*, 274 U. S. 352.

Every general rule has its apparent exceptions. These apparent exceptions are not denials of the rule, they are the logical operation of the principles of the rule when applied to special circumstances. They are assertions, not denials of the rule. We admit the apparent exception in cases where a non-resident corporation is defendant. The result reached in these cases is not a denial of the rule, it is an affirmance of the rights of a citizen, a refusal to grant those rights to one not a citizen. It is a refusal to recognize the powers of a sovereign beyond its borders, a recognition of the sovereign's powers over a fictitious entity which is present within its borders in the only way it can be present anywhere.

Hess vs. Pawloski was decided after *Flexner vs. Farson*, it does not overrule the earlier case and does cite it with approval. There is no conflict of doctrine in the two opinions and we can write the entire sum and substance of our brief from the *Hess* opinion:

> "The process of a court of one state cannot run into another and summon a party there domiciled to respond to proceedings against him. Notice sent outside a state to a non-resident is unavailing to give jurisdiction in an action against him personally for money recovery. * * * There must be actual service within the state of notice upon him or upon some one authorized to accept service for him. * * * A personal judgment rendered against a non-resident who has neither been served with process nor appeared in the suit is without validity. * * * The mere transaction of business in a state by non-resident natural persons does not imply consent to be bound by the process of its courts. * * * The power of a state

> to exclude foreign corporations although not absolute but qualified is the ground on which such an implication is supported as to them. * * * But a state may not withhold from non-resident individuals the right of doing business therein. The privileges and immunities clause of the Constitution § 2 Art. 4 safeguards to the citizen of one state the right 'to pass through or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise.'"

The principles announced in *Flexner vs. Farson* and in *Hess vs. Pawloski* are the same. They are the principles for which we contend. When these principles were applied to the facts in the *Farson* case, the holding was no jurisdiction. When they were applied to the special facts in the *Hess* case, the holding was proper jurisdiction. When they are applied to the facts in *Doherty vs. Goodman*, the holding will be according to the case with which the facts place the present case.

What are the facts which must control the result the application of the principles will produce?

1. Farson was never in Kentucky.

Hess was personally present within Massachusetts, personally participated in the accident giving rise to the cause of action.

Doherty was never in Iowa.

2. In *Flexner vs. Farson*, the service was pursuant to Section 51 of the Civil Code of Kentucky which provided in part:

> "In actions against an individual residing in another state, or a partnership, association, or joint stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager or agent of, or person in charge

> of, such business in this state, in the county where the business is carried on or in the county where the cause of action occurred."

This was a general statute applying to business of every nature when carried on by an agent.

In *Hess vs. Pawloski*, the service was pursuant to Chapter 90 of the Laws of Massachusetts. This was the chapter dealing with and regulating automobiles. Sections three and four of the chapter gave non-residents the privilege to drive automobiles over the highways of the state. A later section provided that if a non-resident accepted these privileges as evidenced by his driving an automobile under the circumstances they permitted, such acceptance should be deemed the appointment of the state registrar of automobiles as the non-resident's agent for purposes of service of summons in actions arising out of accidents or collisions in which the non-resident became involved while so operating the automobile.

This statute is a special statute, one part of a chapter regulating an instrument inherently dangerous and peculiarly subject to the police power.

Immediately after stating the controlling principles Mr. Justice Butler states:

> "Motor vehicles are dangerous machines; and even when skillfully and carefully operated their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all residents and non-residents alike, who use its highways."

We need not now argue the limits of police power. Section 11079 of the Iowa Code does not purport to be a police power statute. As shown by the dissenting opinion of Mr. Justice Morling in *Davidson vs. Doherty*, this section was

originally Section 1705 of the Code of 1851, and then was in the Chapter entitled Place of Bringing Suit. In the Revision of 1860, it was split into two parts, one of which was retained in the venue chapter, the other, the present section 11079, was put by the Code Commission in the Manner of Commencing Actions chapter, then chapter 120, in our present Code Chapter 489. This section is no part of our Iowa Securities Act. Securities Acts had not been heard of in 1851 or in 1860. When we did pass a Securities Act in 1927, it became Chapter 393 and as amended it is Chapter 393-C1.

If the sale of securities justifies the exercise of police power, if this power includes the right to provide a special manner of service of summons in actions arising out of such sales, then Iowa has provided such a service, and it avails naught for Goodman.

In our Securities Act, Chapter 393-C1 of our Code we find Section 8581-C9 which provides a special manner of serving original notice of actions arising from the sales of securities. No service pursuant to this section is before this court.

If Iowa had police power to provide a special manner of service in this case, Iowa has exercised this power in Section 8581-C9 of the Code. There is, and can be, no claim that the present service was made pursuant to this section.

Appellee should not argue for a police power based on fraud. No fraud is involved in this case. The petition does not allege fraud of any sort whatsoever.

On this point we find that *Flexner vs. Farson* condemned a general statute in the Civil Code which made an agent of a non-resident principal the agent for service. No police power was involved.

Hess vs. Pawloski sustained a section which was part of the chapter regulating automobiles and applied to a special class of cases because it was a proper exercise of a special police power.

Doherty vs. Goodman questions a general statute in the Civil Code which makes an agent of a non-resident principal the agent for service? No police power is involved. Section 11079 is the substantial equivalent of the Kentucky statute.

Again the facts place us with *Flexner vs. Farson.*

3. Farson was exercising his right to transact business in Kentucky by an agent. Kentucky could neither prohibit nor burden this exercise of Farson's right. Hess was exercising special privileges extended to him by Massachusetts. He was using a dangerous machine on the highways owned and maintained by the state. The state could properly regulate the exercise of the privilege it granted.

Kentucky offered Farson nothing and he received nothing from the Kentucky statute. His rights as a citizen of Illinois gave him all he ever had.

Massachusetts offered Hess privileges of value, the privilege of driving a dangerous machine on a highway owned and maintained at great expense by the state. The statute which offered the privilege demanded a reasonable consideration. In return Hess should appoint a reasonably convenient agent for service. Acceptance of the bargain offered by the statute brought both the privilege and the obligation, the one was ample consideration for the other.

Had Hess stayed on private tracks, the Massachusetts statute would not purport to affect him.

Doherty was exercising his right to transact business in Iowa by an agent. Section 11079 applies to every form of business. It imposes a burden upon all non-residents in every form of business, as did the Kentucky statute. Section 11079 offers no privilege, asks no agreement, gives no consideration for any consent to anything, express, or implied. If there is any consent, express or implied, in the present case, then it must be consent to be bound by Section

8581-C9 of the Securities Act, and no such consent is relied upon, or even claimed.

On this point also *Flexner vs. Farson* controls the present case.

4. The Kentucky statute made no provision that the agent served should forward the notice. The Massachusetts statute made provision that the agent would forward the notice. Section 11079 makes no such provision. We still match the facts in *Flexner vs. Farson.*

5. The Kentucky statute made no provision, so far as the opinion shows, to give a non-resident who lived at distance extra time to appear.

The Massachusetts statute provided for continuances sufficient to give Hess ample time.

Section 11079 is peculiarly vicious with respect to time. It must be read in connection with Section 11059.

> *11059* HOW LONG BEFORE TERM. The defendant shall be held to appear at the next term after service:
>
> 1. If served within the county where the action is brought in such time as to leave at least 10 days between the day of service and the first day of the next term.
> 2. If without the county but within the judicial district so as to leave at least fifteen such days.
> 3. If elsewhere so as to leave twenty such days for every one thousand miles or fraction thereof extending between the places of trial and service.

By section 11055, defendants must appear by noon of the second day of this next term or default will be entered and judgment entered thereon.

This service was had in Polk County, the county where the action was brought. Doherty had only eleven clear days. Polk County is a judicial district. The resident of an adjoining county served therein would have twenty-one days to

appear. Had Doherty been served in person in New York, he would have had forty-one days to appear. Any civilized community will give a person twelve hundred miles away more than eleven days to learn of a suit, employ counsel, instruct counsel as to the facts, prepare and file answer.

Section 11079 and the facts of this case present every point which caused this court to condemn the Kentucky statute under which a substantially similar service was made in *Flexner vs. Farson.* They do not present a single point, which rendered a different result in *Hess vs. Pawloski* a proper application of the established principles although an apparent exception to them.

The nature of our statute, the facts of our case place us well within the short but broad opinion of Mr. Justice Holmes in *Flexner vs. Farson.*

Respectfully submitted,

FRED W. LEHMANN, JR.,
WILLIAM B. HURLBURT,
HARRISON E. SPANGLER,
Attorneys for Henry L. Doherty & Company, Appellant.

19

FILE COPY

FILED
JAN 11 1935
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1934.

No. 469

HENRY L. DOHERTY & COMPANY, *Appellant,*

vs.

FRANK GOODMAN, *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

APPELLEE'S BRIEF AND ARGUMENT.

JOSEPH I. BRODY,
CLYDE B. CHARLTON,
Attorneys for Appellee.
GEORGE E. BRAMMER,
LOUIS A. PARKER,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM 1934.

No. 469

HENRY L. DOHERTY & COMPANY, *Appellant,*

vs.

FRANK GOODMAN, *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

APPELLEE'S BRIEF.

SUBJECT INDEX.

	Page
Statement of the Case	3
Argument	5
Summary	5
Point I	6
Point II	13
Point III	15
Point III (a)	16
Point III (b)	37
Point III (c)	44
Answer to Appellant's Argument	49

TABLE OF CASES.

Alaska Commercial Co. vs. Debney, 144 Fed. 1	43
American Fire Ins. Co. vs. King Lumber & Mfg. Co., 250 U. S. 2	9
Bacon vs. Walker, 204 U. S. 311	7
Baltimore & Ohio Railroad Co. vs. Harris, 79 U. S. 681	11
Blackmer vs. U. S., 284 U. S. 421	16; 50
Bagdon vs. Philadelphia & Reading Coal & Iron Co., 217 N. Y. 432	46
Calhoun vs. Massie, 253 U. S. 170	9
Duncan vs. Missouri, 152 U. S. 377	13
Davidson vs. Doherty, 214 Iowa, 739	35; 43
Edwards vs. Van Cleve, 94 N. E. 596	35
Flexner vs. Farson, 248 U. S. 289	34; 49; 51; 52

Gesell vs. Wells, 240 N. Y. Sup; 254 N. Y. 604 38
Griffith vs. Connecticut, 218 U. S. 563 9
Home Building & Loan Ass'n vs. Blaisdell, 290 U. S. 398 9
Hess vs. Pawloski, 274 U. S. 352 ..... 14; 18, 31; 34; 38; 49; 50; 51
International Harvester Company vs. Kentucky, 234 U. S. 579 34
Kane vs. New Jersey, 242 U. S. 160 ..... 14; 49; 50
Lafayette Ins. Co. vs. French, 18 How. 404 ..... 16; 46
LaTourette vs. McMaster, 248 U. S. 465 ..... 9; 14
Life & Casualty Ins. Co. vs. McCray, 291 U. S. 566 12
Murphy vs. Development Co., 169 Iowa, 542 7
Mutual Loan Co. vs. Martell, 222 U. S. 225 7
Murphy vs. California, 225 U. S. 623 8
Merrick vs. Haisey & Co., 242 U. S. 568 9
Missouri, Kansas & Texas Railway Co. vs. Cade, 233 U. S. 642 12
McDonald vs. Mabee, 243 U. S. 90 ..... 33; 50
Nebbia vs. New York, 291 U. S. 502 9
Old Wayne Life Assoc. vs. McDonough, 204 U. S. 8 51
Pennoyer vs. Neff, 95 U. S. 714 ..... 35; 50
Pinney vs. Nelson, 183 U. S. 144 45
Potti vs. New England Road Machinery Company, 140 Atl. 587 32
Pawloski vs. Hess, 149 N. E. 122 32
Sligh vs. Kirkwood, 237 U. S. 502 8
Simon vs. Southern Railway Company, 236 U. S. 115 51
Smolik vs. Philadelphia & Reading Coal & Iron Co., 222 Fed. 148 ..... 38; 47
Stoner vs. Higginson, 175 Atl. 527 ..... 20; 33; 35; 52
The License Cases, 5 How. 504 7
The Slaughterhouse Cases, 83 U. S. 522 13
U. S. vs. Wheeler, 254 U. S. 281 13
Wuchter vs. Pizzutti, 276 U. S. 13 19
York vs. Texas, 137 U. S. 15 ..... 41; 42
Young vs. Masci, 289 U. S. 253 ..... 40; 42

LAW REVIEW ARTICLES.

20 Michigan Law Review 424 ..... 42; 51
32 Harvard Law Review 888 ..... 35; 51
19 Iowa Law Review 431 37

AMERICAN LAW INSTITUTE'S RESTATEMENT OF THE LAW.

Conflict of Laws Section 90 37

STATUTES.

1)7 Code of Iowa, Section 3518 3
1927 Code of Iowa, Section 8581 c-18 53

STATEMENT OF CASE.

Appellee deems necessary the following additional statement of facts:

Section 11079 of the 1927 Code of Iowa has been the law of Iowa in *haec verba* since 1873 and in substance has been the law of Iowa since 1851.

Section 3518 of the Code of Iowa 1897 provided for the beginning of actions as follows:

> "Method of service. The notice shall be served as follows: 1. By reading it to the defendant, or offering to do so in case he neglects or refuses to hear it read, and in either case by delivering him personally a copy thereof, or, if he refuses to receive it, offering to do so;
>
> 2. If not found within the county of his residence, by leaving a copy thereof at his usual place of residence with some member of the family over fourteen years of age;
>
> 3. By taking an acknowledgment of the service indorsed thereon, dated and signed by the defendant."

This section remains the law to this day except that in 1923 Paragraph 2 thereof was amended to read as follows:

> "2. If not found within the county of his residence, or if, because of his sickness or other disability, personal service can not be made upon him, by leaving a copy thereof at his usual place of residence with some member of his family over fourteen years of age, or with the person having the care and custody of him, or with the head of the family where he resides."

Doherty opened an office in Des Moines, Iowa, and maintained and transacted business in and out of said office from March 1926 to and including the date this action was begun by service on his agent King on July 30, 1931.

(Trans. Pages 11, 12, and 13) Doherty employed King as District Manager for the State of Iowa and pursuant to that employment King took charge of said office in January 1929 and was District Manager for Doherty for the State of Iowa and in charge of said office from that time to July 30, 1931. The business carried on by defendant in said office was the sale in Iowa of corporate securities and particularly the securities issued by Cities Service Company. King had supervision of all employees in the Des Moines office consisting of clerks and stock salesmen who worked out of said office and also had like supervision of offices of the defendant maintained elsewhere in Iowa. Defendant's name was on the door of said office and was listed in the telephone and city directories. The salaries of people working in the Des Moines office was paid directly from New York by defendant. (Trans. Page 13) On September 1, 1929 a duly authorized agent of the defendant working out of the Des Moines office solicited the plaintiff at Des Moines, Iowa, to purchase 15 shares of common stock of Cities Service Company and at said time and place plaintiff agreed to purchase and defendant agreed to sell said 15 shares of said stock. (Trans. Pages 13 and 14) Thereafter, on July 15, 1931, plaintiff rescinded this transaction (Trans. Pages 9 and 10) and on July 30, 1931 brought this action for the return of money paid and served notice on King, the agent, at a time when Doherty was still doing business in the State of Iowa.

The record does not show that King was an Iowan nor does it show where the contract of employment between Doherty and King was made.

ARGUMENT.

SUMMARY.

1. The sovereign State of Iowa had the power to regulate the doing of business by and through an agent. This is a method of doing business which is attended with particular attributes inimical to the economic and social welfare of the community and in the exercise of its police power the Legislature of the State of Iowa could regulate it by enacting Section 11079 of the Code of Iowa. This provided that in actions growing out of the agency, service of process might be made upon the principal by serving the agent.

2. The legislation here assailed does not violate the privileges and immunities clause of Section 2 of Article IV of the Constitution, nor of Section 1 of the 14th Amendment to the Constitution for a privilege and immunity of a citizen of the United States was not affected and the legislation is not discriminatory applying equally to citizens of Iowa as well as of other states.

3. (a) Appellant impliedly assented to the jurisdiction of the State of Iowa by sending an agent into the State and doing business through that agent long after the enactment of Section 11079.

(b) The Appellant accepted the benefits conferred by the laws of the State of Iowa and was obligated to be bound by those laws. The rights and obligations were reciprocal.

(c) Appellant expressly consented to the jurisdiction of the Courts of Iowa for the contract of employment was to be performed in the State of Iowa and the law of Iowa conferred upon the agent the power and authority to be the process agent of Appellant as to actions growing out of that agency.

I.

DOING BUSINESS WITH THIRD PARTIES BY AND THROUGH AN AGENT IS A METHOD OF DOING BUSINESS WHICH MAY BE REGULATED BY A SOVEREIGN STATE.

Business may be transacted by an individual either by himself or through the interposition of his agent. The two methods are radically different. In one, the individual deals directly with the third party, and in the other the principal may never come into direct contact or relationship with the third party. In the one case, the individual will generally be in close proximity to the third party and the place of the performance of the contract. In the other case, the principal will generally be removed from the place of the execution of the contract and the performance of its obligations. In the former case, the principle and the third party will be readily and conveniently available to respond to a claim for a breach of the contract, while in the latter case, while the third party is available to respond to a claim for a breach of the contract on his part at the place of the execution and performance of the contract, yet, generally the principal is removed at some distance, great or small, from the reach of the third party to the disadvantage of the third party. This was an inequality and an evil that the legislature of the State of Iowa sought to remove by the enactment of Section 11079. Without Section 11079 many small claims against a principal removed in distance would in a practical sense be lost. The cost of enforcing them would be greater than the returns from the litigation. To a lesser degree the enforcement of larger claims would be similarly affected. Thus, a right of a citizen would in effect be lost or lessened.

It cannot be successfully contended that the legislature of the State of Iowa lacked power to enact Section 11079

in so far as it applies to citizens of Iowa. This section has been upheld by the Supreme Court of Iowa in *Murphy v. Development Company,* 169 Iowa 542. The power of a sovereign state sometimes termed its "police power" includes all legislation and almost every function of civil government. In its broadest sense it means the power to govern. It includes all powers which a sovereign state has.

In the *License Cases,* 5 Howard 504, 12 L. Ed. 256, Chief Justice Taney said:

> "But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."

In *Mutual Loan Company v. Martell,* 222 U. S. 225, 56 L. Ed. 175, this Court said:

> "To sustain this contention it is urged that the statute being an exercise of the police power of the state, its purpose must have 'some clear, real, and substantial connection' with the preservation of the public health, safety, morals, or general welfare; and it is insisted that the statute of Massachusetts has not such connection and is therefore invalid.
>
> This court has had many occasions to define, in general terms, the police power, and to give particularity to the definitions by special applications. In *Chicago, B. & Q. R. Co. v. Illinois,* 200 U. S. 561, 592, 50 L. E. 596, 609, 26 Sup. Ct. Rep. 341, 4 A. and E. Ann. Cas. 1175, it was said that 'the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety;' and that the validity of a police regulation 'must depend upon the circumstances of each case and the character of the regulations, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose.'
>
> In *Bacon v. Walker,* 204 U. S. 311, 318, 51 L. Ed. 499, 502, 27 Sup. Ct. Rep. 289, it was decided that the

police power is not confined 'to the suppression of what is offensive, disorderly, or unsanitary,' but 'extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people.'

In a sense, the police power is but another name for the power of government; and a contention that a particular exercise of it offends the due process clause of the Constitution is apt to be very intangible to a precise consideration and answer. Certain general principles, however, must be taken for granted. It is certainly the province of the state, by its legislature, to adopt such policy as to it seems best. There are constitutional limitations, of course, but these allow a very comprehensive range of judgment. And within that range the Massachusetts statute can be justified. Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induced it; and this test was applied by the supreme judicial court of Massachusetts in passing on the validity of the statute under review."

In *Murphy v. California*, 225 U. S. 623, this Court said:

"The 14th Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public."

In *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. Ed. 835, the Court said:

"The police power in its broadest sense includes all legislation and almost every function of civil government. It is not subject to definite limitations but is coextensive with the necessities of the case and the safeguards of public interest. It embraces regulation designed to promote public convenience or the general prosperity or welfare as well as those specifically intended to promote the public safety or the public health."

The power of the state may be exercised for economic as well as for social reasons. The motives of the legislature are not subject to examination.

In *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 78 L. Ed. 113, the Court said:

> "And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes."

In *Griffith v. Connecticut*, 218 U. S. 563, 54 L. Ed. 1151, it was held that the state might fix the price which may be exacted for the use of money.

In *Calhoun v. Massie*, 253 U. S. 170, 64 L. Ed. 843, it was held that the sovereign might regulate the amount of an attorney's fee.

The state may regulate insurance agents. *LaTourette v. McMaster*, 248 U. S. 465, 63 L. Ed. 362; may declare that a person who solicits insurance and procures applications therefor, or receives or receipts for money for any contract of insurance, shall be the agent of the insurance company, notwithstanding any provision to the contrary in the policy. *American Fire Ins. Co. v. King Lumber & Mfg. Co.*, 250 U. S. 2, 63 L. Ed. 810; may regulate the sale of securities. *Merrick v. Halsey & Company*, 242 U. S. 568, 61 L. Ed. 498, and may regulate the milk business. *Nebbia v. New York*, 291 U. S. 502, 78 L. Ed. 940. Countless other regulations of businesses and persons are appended to the decision in *Nebbia v. New York*.

Section 11079 was unquestionably enacted because the legislature of the State of Iowa felt that it would be a miscarriage of justice to permit a man, by means of an agent, to carry on his business at a place far distant from his

residence and then when the agent committed a legal wrong to compel the injured party to prosecute his suit at the residence of the principal. The situation is the same, whether only Iowa citizens are involved, or citizens of other states. The evil is greater when the principal's residence is removed from the State of Iowa. The cost and expense of prosecuting a suit at the residence of the principal has often consumed the fruits of recovery and has many times deterred the bringing of any suit at all, thus enabling the wrong-doer to go scot-free. Nothing could be more destructive of law and order than a system which permits a wrong-doer to escape answering for his wrong. The method of doing business through an agent frequently gives rise to practices of fraud and imposition on the community. For instance, the defendant, a citizen and resident of New York, sends his agents into far distant Iowa for the purpose of engaging in business on his behalf. The agents may or may not be financially responsible; may or may not be honest. The principal may or may not have property within the state. Permanent places of business are selected in the cities of Des Moines, Davenport and Sioux City, Iowa. From these offices the agents of the nonresident principal scatter over the State of Iowa carrying on the business of their employer. Countless people rush to buy what Doherty's agents dazzle before their eyes. Millions of dollars, through the use of this method of doing business, pour into his lap. The money received from the people of Iowa is transmitted to New York. In the process of reaping this harvest, citizens of Iowa are defrauded by these agents. They are not financially responsible. There is little or no property of the principal within the State. In the absence of remedial legislation, such as Section 11079, a citizen of Iowa may not file suit in the courts of this state. He must cross the continent and seek relief in the courts of New York. Otherwise, he is remediless. The Court will take

judicial notice that in the past decade securities were sold to countless thousands in small lots. In the case at bar, it happened to be fifteen shares of Cities Service stock valued then at $51.50 per share. The amount paid by the plaintiff totaled $150.00. Can this plaintiff, or any such plaintiff, afford to go from Iowa to New York to enforce a claim, however just, for such a small amount? For all practical purposes, unless such legisation as is embodied in Section 11079 be upheld, persons who have just claims arising from fraud or breach of contract, are, as a practical matter, deprived of their rights and Doherty is clothed with immunity from legal responsibility. What has been said concerning Doherty, a resident of New York, applies with lesser force to a resident principal living in the State of Iowa, who scatters his agents to the four corners of the state. Even in that situation, unless the claims are of considerable amount, recovery is not worth the trouble and expense involved. The difficulties in fixing responsibility upon an absent principal for the acts of his agent where this method of doing business by and through an agent is used is not imaginary but actual and real. Mr. Justice Swayne, in *Baltimore & Ohio R. R. Co. v. Harris*, 79 U. S. 681, 20 L. Ed. 354, said:

> "Here the question is whether the company was suable in the District of Columbia. In the case reported in Grattan, it was said: 'It would be a startling proposition if, in all such cases, citizens of Virginia and others should be denied all remedy in her courts, for causes of action arising under contracts and acts entered into or done within her territory, and should be turned over to the courts and laws of a sister state to seek redress.' The same considerations apply to the case before us. When this suit was commenced, if the theory maintained by the counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress

short of the seat of the company in another state. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility. It is not to be supposed that Congress intended that the important powers and privileges granted should be followed by such results."

Legislation designed to promote the prompt payment of small claims and to discourage unnecessary litigation in respect to them was upheld in *Missouri, Kansas & Texas Railway Company v. Cade*, 233 U. S. 642, 58 L. Ed. 1135. Likewise, legislation imposing upon an insurance company additional damages of 12% and reasonable attorneys' fees for failure to pay a claim on a policy within a specified time, after demand made therefor, was upheld in Life & *Casualty Insurance Company v. McCray*, 291 U. S. 566, 78 L. Ed. 987. These decisions were placed upon the ground of the social needs.

We therefore submit that the legislature of the sovereign state of Iowa had the power to enact Section 11079; that it was enacted in response to a substantial evil and social need; that the means taken to attain the end were reasonable; that every citizen and resident of the State of Iowa is bound thereby, and that a nonresident individual is bound thereby, unless this legislation be stricken down by the prohibitions of Section 2 of Article IV and Section 1 of the 14th Amendment of the Constitution of the United States.

II.

SECTION 11079 OF THE CODE OF IOWA DOES NOT VIOLATE SECTION 2 OF ARTICLE IV OF THE CONSTITUTION OF THE UNITED STATES, NOR DOES IT ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES PROTECTED BY SECTION 1 OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The privileges and immunities clause of Section 1 of the 14th Amendment only protects a citizen of the United States in his privileges and immunities that arise out of the nature and essential character of the Federal Government and granted or secured by the Constitution.

Duncan v. Missouri, 152 U. S. 377, 38 L. Ed. 485.

The Slaughterhouse Cases, 83 U. S. 522, 21 L. Ed. 395.

United States v. Wheeler, 254 U. S. 281, 65 L. Ed. 270.

Section 2 of Article IV of the Constitution provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. The purpose of this provision is stated in *The Slaughterhouse Cases*, 83 U. S. 522, as follows:

> "Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

See, also,

United States v. Wheeler, 254 U. S. 281, 65 L. Ed. 270.

LaTourette v. McMaster, 248 U. S. 465.
Kane v. New Jersey, 242 U. S. 160, 61 L. Ed. 222.
Hess v. Pawloski, 274 U. S. 352, 71 L. Ed. 1091.

The right to do business in the State of Iowa is not a privilege or immunity of a citizen of the United States.

Section 2 of Article IV of the Constitution does not invalidate Section 11079 of the Code of Iowa. Because the operation of said Section applies alike to a citizen of the State of Iowa and to a citizen of the State of New York, there is no hostile discrimination against a citizen of another state. This section of the Iowa law tends to put the citizens of other states upon an equality with citizens of the State of Iowa. The right of the appellant to do business in the State of Iowa, by a means of an agent, could be burdened, regulated and restricted so long as like burdens, regulations and restrictions were put upon that method of doing business by a citizen of the State of Iowa without violating the provisions of Section 2 of Article IV of the Constitution.

We therefore submit that Section 11079 of the Code of Iowa is not stricken down by the provisions of Section 2 of Article IV nor by the privileges and immunities clause of the 14th Amendment to the Constitution of the United States.

III.

SERVICE OF NOTICE OF SUIT MADE IN ACCORDANCE WITH SECTION 11079 OF THE CODE OF IOWA CONFERRED JURISDICTION UPON THE COURTS OF THE STATE OF IOWA TO RENDER A PERSONAL JUDGMENT AGAINST APPELLANT AND SUCH ACTION DOES NOT DEPRIVE APPELLANT OF LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW IN CONTRAVENTION OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, NOR IN CONTRAVENTION OF THE LAW OF THE LAND.

Appellee contends that the Courts of Iowa had jurisdiction of appellant in this cause resulting from appellant sending an agent into the state and doing his business through that agent (Section 11079 of the Code of Iowa being then the law of the State of Iowa) upon the following bases:

1. Appellant impliedly consented to the jurisdiction of the courts of Iowa;

2. Appellant accepted the benefits conferred by the laws of the State of Iowa and thereby obligated himself to the burdens and restrictions of that law;

3. Appellant expressly consented to the jurisdiction of the courts of Iowa in that the law of Iowa was read into the contract of employment and conferred upon the agent the power and authority to be the process agent of appellant on actions growing out of that agency.

As a discussion preliminary to the argument on the bases above stated we wish to reply to the contention of Appellant, to wit, that Doherty had an absolute right to come to Iowa and do business in the State of Iowa and that the State could not in any way restrict him in those regards. A large number of cases have made this same statement of the law. However, each such case must be considered on its facts and upon such examination it will appear that in every such

case the court meant that a citizen of a foreign state might come into the State and do business as freely and on the same basis as a citizen of the State involved. Certainly no one would contend that a citizen of Iowa is entitled to enter the State of New York and engage in the milk business free from any restraint or that a citizen of Iowa might go to Florida or North Carolina and engage in the insurance business, the real estate business, the securities business or the liquor business, without being subject to the regulatory measures of the several states. We, therefore, submit that Doherty did not have an absolute right to come to Iowa and do business free from any restrictions whatsoever; that the measure of his right was to come to Iowa and do business under any and all restrictions and regulations that Iowa applies to its own citizens in that particular business and this means that Doherty was subject to the regulations of the State of Iowa applicable to the method of doing business by an agent.

As stated by Appellant, one of the bases of jurisdiction is physical power. However, that is not the only basis of jurisdiction. Jurisdiction is posited upon citizenship or allegiance, *Blackmer v. United States*, 284 U. S. 421; 76 Law Ed. 375, upon consent express or implied, and upon obligation.

1. This Court has held that the appointment of a process agent need not be express. It may be implied.

In *Lafayette Ins. Company v. French*, 18 How. 404, 15 Law Ed. 451 it was held that a foreign corporation which failed to give express consent to being sued in the State of Ohio was deemed to have given implied consent to the service of process upon it by serving its agent in the State. Mr. Justice Curtis in that case said:

> "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State (13 Pet., 519). This consent may be

accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states, and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.

In this instance, one of the conditions imposed by Ohio was, in effect, that the agent who should reside in Ohio enter into contracts of insurance there in behalf of the foreign Corporation, should also be deemed its agent to receive service of process in suit founded on such contracts.

* * * * *

Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the Corporation must be taken to assent to the condition upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the Corporation to receive service of process in suits on such contracts, and, in legal contemplation, the appointment of such an agent clothed him with power to receive notice, for and on behalf of the Corporation, as effectually as if he were designated in the charter as the officer on whom process was to be served; or, as if he had received from the President and Directors a power of attorney to that effect. The process was served within the limits and jurisdiction of Ohio, upon a person qualified by law to represent the Corporation there in respect to such service; and notice to him was notice to the Corporation which he there represented, and for whom he was empowered to take notice.

* * * * *

We limit our decision to the case of a Corporation acting in a state foreign to its creation, under a law of that state which recognized its existence, for the purposes of making contracts there and being sued on them, through notice to its contracting agents. The case

of natural persons, and of other foreign corporations, is attended with other considerations, which might or might not distinguish it; upon this we give no opinion."

The same rule has been applied to a non-resident natural person. In *Hess v. Pawloski*, 274 U. S. 352, 71 Law Ed. 1091 a resident of Pennsylvania drove his motor car into Massachusetts and injured the plaintiff. No personal service was made on the defendant and no property belonging to him was attached. The service of process was made in compliance with the Massachusetts law which provided that the operation by a non-resident of a motor vehicle upon a public highway shall be a signification of his agreement that any process against him may be served upon the registrar of the motor vehicle. The defendant appeared specially for the purpose of contesting the jurisdiction and moved to dismiss on the ground that the service of process, if sustained, would deprive him of his property without due process of law in violation of the 14th Amendment. This was overruled and judgment rendered against him. Upon an appeal to this court the service was upheld and the Court said:

"Motor vehicles are dangerous machines; and, even when skilfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the state where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved. It is required that he shall actually receive and receipt for notice of the service and a copy of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for

defense. It makes not hostile discrimination against non-residents, but tends to put them on the same footing as residents. Literal and precise equality in respect of this matter is not attainable; it is not required. *Canadian Northern R. Co. v. Eggen*, 252 U. S., 553, 561, 562, 64 L. Ed. 713, 716, 40 Sup. Ct. Rep. 402. The state's power to regulate the use of its highways extends to their use by non-residents as well as by residents. *Henrick v. Maryland*, 235 U. S. 610, 622, 59 L. Ed. 385, 390, 35 Sup. Ct. Rep. 140. And, in advance of the operation of a motor vehicle on his highway by a non-resident, the state may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use. *Kane v. New Jersey*, 242 U. S. 160, 167, 61 L. Ed. 222, 226, 37 Sup. Ct. Rep. 30. That case recognizes power of the state to exclude a non-resident until the formal appointment is made. And, having the power to exclude, the state may declare that the use of the highway by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served. *Cf. Pennsylvania F. Ins. Co. v. Gold Issue Min. Co., supra*, 96 (61 L. Ed. 616, 37 Sup. Ct. Rep. 344); *Lafayette Ins. Co. v. French*, 18 How., 404, 407, 408, 15 L. Ed. 451, 453. The difference between the formal and implied appointment is not substantial so far as concerns the application of the due process clause of the 14th Amendment.

Judgment affirmed."

The same rule was re-affirmed by Chief Justice Taft in *Wuchter v. Pizzutti*, 276 U. S. 13; 72 L. Ed. 446, where the Court said:

"It is settled by our decisions that a state's power to regulate the use of its highways extends to their use by non-residents as well as by residents. *Hendrick v. Maryland*, 235 U. S. 610, 622, 59 L. Ed. 385, 390, 35 Sup. Ct. Rep. 140. We have further held that, in advance of the operation of a motor vehicle on its highways by a non-resident a state may require him to take out a license and to appoint one of its officials as his agent, on whom process may be served in suits growing out of accidents in such operation. This was under the license

act of New Jersey, last above referred to, and not No. 232. *Kane v. New Jersey*, 242 U. S. 160, 167, 61 L. Ed. 222, 226, 37 Sup. Ct. Rep. 30. We have also recognized it to be a valid exercise of power by a state, because of its right to regulate the use of its highways by non-residents, to declare, without exacting a license, that the use of the highway by the non-resident may by statute be treated as the equivalent of the appointment by him of a state official as agent on whom process in such a case may be served. *Hess v. Pawloski*, 274 U. S. 352, 71 L. Ed. 1091, 47 Sup. Ct. Rep. 632."

In *Stoner v. Higginson* decided November 26, 1934 reported in 175 Atl. Rep. 527 the Supreme Court of Pennsylvania upheld a Pennsylvania statute similar to Section 11079 of the Code of Iowa. In that case Lee Higginson & Company, a co-partnership, conducted its business in Pennsylvania through an agent upon whom the process was served. The contention was made that such a service deprived the defendants all that due process of law guaranteed by the 14th Amendment to the Constitution of the United States. The court rejected that contention and said:

"The next question is: Did the service of this process on these non-resident defendants by serving their designated agent deprive them of that 'due process of law' guaranteed by the Fourteenth Amendment to the United States Constitution as the United States Supreme Court has interpreted that phrase? Appellants contend that it does. Their proposition is that the service was 'not good' even if defendants had continued to do business in Allegheny County and Gilliland had continued in their employ to and including the date of service. They argue: 'The defendants were non-residents of the Commonwealth. They were not served with process. A non-resident absent individual does not become amenable to a court in Pennslyvania in an action in personam without service upon him even if he does do business in Pennsylvania through his agents or employees. Our legislature is without constitutional power to enact a statute purporting to place

non-resident individuals under the jurisdiction of our courts when such individuals are not served and are geographically beyond the reach of process. Assent to a statutory substituted or constructive service intended to create jurisdiction *in personam*, when in fact such jurisdiction does not exist, cannot be made a condition of doing business within the State. Non-resident individuals, unlike foreign corporations, are citizens and as such have an absolute right to do business in a lawful manner in every state, and submission to suit *in personam* without any effectual service of process cannot be compelled by statute.'

If appellants mean to invoke 'an absolute right to do business' in every state the answer is that they are invoking something which in the practical affairs of government is non-existent. All constitutional and statutory rights must be exercised with due regard for the regulations of the sovereign of the place of exercise. Even the so-called 'fundamental right' to life, liberty and the pursuit of happiness is not absolute but relative. If appellants mean simply to invoke the right of citizens of other states to do business in this Commonwealth 'in a lawful manner', the answer is that that right is unchallenged on this record, but the point is made that they were doing business in this Commonwealth 'in a lawful manner' only when they complied with the Fictitious Names Act of 1917 by designating an agent and by here submitting through this agent to the service of judicial process as the laws of this Commonwealth prescribe. We hold that none of these statutes infringe upon the due process clause of the Federal Constitution.

'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,' as Section 2 of Article IV of the Constitution declares. This has been interpreted as the right 'to pass through, or to reside in any other State for purposes of trade, agriculture, professional pursuits or otherwise.' See *Ward v. Maryland*, 12 Wall. 418 at 430, and *Paul v. Virginia*, 8 Wall. 168, 180. But this right is no more nearly 'absolute' than any other rights guaranteed citizens by the Federal Constitution and there are numerous examples of State regulation of federal rights,

which regulations have been upheld by the United States Supreme Court. For example, a State cannot lawfully exclude from its domain a corporation which is engaged solely in interstate commerce. But this powerlessness to exclude, does not mean powerlessness to impose fair and reasonable conditions of admission. The United States Supreme Court in *International Harvester Co. v. Kentucky*, 234 U. S. 579, 58 Law. Ed. 1479, while expressly reaffirming the proposition that 'a State cannot burden interstate commerce or pass laws which amount to the regulation of such commerce' said 'this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the State which is wholly of an interstate commerce character. Such corporations are within the State, receiving the protection of its laws, and may and often do have large properties located within the State.' The Supreme Court in that case upheld the right of Kentucky to require a corporation engaged in purely interstate commerce as a condition of doing business there, to designate an agent upon whom process could be served. It *rejected* as 'novel' and without judicial support the proposition that 'as long as a foreign corporation engages in interstate commerce only, it is immune from the service of process under the laws of the State in which it is carrying on such business.'

In *Chicago, Rock Island and Pacific Railway Co. v. State of Arkansas*, 219 U. S. 453, the United States Supreme Court cited with approval the following from the opinion of Mr. Justice Matthews in *Sherlock v. Alling*, 93 U. S. 99, 'Legislation, in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution * * * And it may be said generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of its citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.'

In *Continental Baking Co. et al. v. Woodring, Governor, et al.*, 286 U. S. 352, 365, the Supreme Court of the United States in an opinion by Chief Justice Hughes upheld the Kansas Motor Vehicle Act as applied to interstate commerce. This act required that motor carriers of property, using public highways of the State can only do so upon condition that they obtain a license, comply with reasonable regulations, pay a reasonable license fee and a tax for expenses of highway administration and maintenance and reconstruction of the highways covered by the license, and upon the filing of an insurance policy as security against injuries to persons and property other than the passengers and property he carries, from the carrier's negligent operation. The Chief Justice said: 'Reasonable regulations to that end are valid as to intrastate traffic and, where there is no discrimination against the interstate commerce which may be affected, do not impose an unconstitutional burden upon that commerce.'

In *Hendrick v. State of Maryland*, 235 U. S. 610, the Supreme Court of the United States in an opinion by Mr. Justice McReynolds said: 'There can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce.'

A State has no more power to exclude arbitrarily from its domain individual citizens who wish to journey therein or to do business there than it has to exclude corporations engaged solely in interstate commerce. Yet it has been held that though a State cannot exclude citizens of other States, it may without infringing upon the Federal Constitution impose conditions upon admission. That individual citizens of one State who use the highways of another may be compelled by the laws of that other State to 'appoint' by their very use of those highways an official of the visited State, as their agent or attorney, upon whom process may be served with the

same force and effect as though served on them personally, provided actual notice of such service has been received by such citizens has been expressly decided. In *Hess v. Pawloski*, 274 U. S. 352, the Supreme Court of the United States held that a Massachusetts statute which declares that the use of the State's highways by a non-resident motorist shall be deemed equivalent to an appointment by him of the registrar (of motor vehicles) as his attorney upon whom process may be served in any action growing out of an accident or collision in which the non-resident may be involved while operating a motor vehicle upon such highways, and which provides for service in such case by leaving a copy of the process and a fee with the registrar or in his office, but conditions the sufficiency of the service upon the sending of notice of it forthwith and a copy of the process to the defendant by registered mail and upon his actually receiving and receipting for the same, and which allows the non-resident when so served such continuances as may be necessary to afford him a reasonable opportunity to defend the action, did not contravene the due process clause of the Fourteenth Amendment. The court declared that this statute 'makes no hostile discrimination against non-residents but tends to put them on the same footing as residents. Literal and precise equality in respect of this matter is not attainable; it is not required. * * * In advance of the operation of a motor vehicle on its highway by a non-resident, the State may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use.'

In *Kane v. State of New Jersey*, 242 U. S. 160, the Supreme Court of the United States in an opinion by Mr. Justice Brandies held that a State may require non-resident owners to appoint a State Official as agent upon whom process may be served in legal proceedings brought against them, and resulting from the operation of their motor vehicles, within the State, citing *Hendrick v. Maryland, supra.* In this case, Mr. Justice Brandeis said: 'There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against non-residents, denying them equal protection of the law. On the contrary, it puts non-resident owners upon an equality with resident owners.'

It may be urged that a statutory requirement that visiting motorists automatically designate a State official as their attorney upon whom process may be served is distinguishable from the situation now before us in that it is merely the exercise of the State's police power in the interest of the safety of its citizens. The answer to that is that such requirements are not in their essence '*police* regulations' but *procedural* regulations. A State protects its citizens from reckless motorists *primarily* by penal laws, making the negligent operation of motor vehicles a crime. Penal laws serve the public safety better than civil procedures or regulations, for in criminal prosecutions growing out of fatal or non-fatal injuries to its inhabitants, the defense of contributory negligence is not available whereas in civil suits for damages caused by negligent operation of motor vehicles, contributory negligence is a defense. Laws like the Massachusetts statute and New Jersey statute which were reviewed in the last two cases cited, are designed by the States enacting them to enable their injured citizens to maintain actions *in their own courts* against the citizens of other States who by negligent operation of motor vehicles inflicted injuries upon them.

However, even if we regard such acts exclusively as police regulations, that view of them would not give them a constitutionally preferred status over the Pennsylvania acts now being reviewed. The United States Supreme Court in *Sligh v. Kirkwood, Sheriff of Orange County Florida*, 237 U. S. 52, said in an opinion by Mr. Justice Day, (at Page 59): 'At an early day it (the police power) was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the State, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the State. * * * The police power, in its broadest sense, includes all legislation and almost every function of civil government. * * * It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health.'

The essence of appellants' complaint is that they have been denied due process of law. This is based, of course, not on any departure from 'due process' in the course of a trial, for as yet there has been no trial; It must be based on departure from 'due process' in giving notice to appear and defend. In *Holden v. Hardy*, 169 U. S. 366, 389, the Supreme Court of the United States in referring to due process of law, said: 'No man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense.' In the case of *Wuchter v. Pizzutti*, 276 U. S. 13, which was cited by appellants, it was held that a State statute of New Jersey which provides that in actions by residents of the State against non-residents for personal injuries resulting from the operation by the latter of their motor vehicles on the State highways, service of summons may be made on the Secretary of State, as their agent, and which contains no further provision making it reasonably probable that notice of such service will be communicated to the defendants, was lacking in due process of law, because as Chief Justice Taft said in his opinion, 'The enforced acceptance of the service of process on a State officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice.' This case is clearly distinguished from the instant case because here defendants selected their own agent, and it may be fairly presumed that his was the duty of communicating to his principal the fact of service, as he actually did.

In *Washington v. Superior Ct.*, 289 U. S. 361, in which the question raised involved the validity of conditions imposed upon a foreign corporation as a prerequisite to doing business in that State, the United States Supreme Court apparently found *nothing unfair* about a provision which required a foreign corporation to appoint and register a resident agent empowered to accept service of process, etc. In that case Mr. Justice Roberts said: 'By appointing a new agent when Shaw ceased to be a resident of the State *the*

appellant could have assured itself of notice of any action.'

Appellants quote from *Pennoyer v. Neff*, 95 U. S. 714, where service was by publication, the quotation containing, *inter alia*, the following excerpt: 'Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them.' This proposition is incontrovertible and we recently expressly recognized and re-emphasized it in our opinion in *Atlantic Seaboard Natural Gas Co. v. Whitten*, 315 Pa. 529, 173 A. 305. There we also quoted the following from an opinion of the United States Supreme Court in the case of *Hollingsworth v. Barbour, et al.*, 4 Peters 466, 474: 'No man's right should be prejudiced by the judgment or decree of a Court, without an opportunity of defending the right. This opportunity is afforded, or supposed in law to be afforded, by a citation or notice to appear, actually served; or constructively, by pursuing such means as the law may, in special cases, regard as equivalent to personal service.' The case now before us is not one of a process of Pennsylvania going into another State; it is a case of process being served *in this State* on a non-resident's local agent, which service under our law is 'equivalent to personal service' on the non-resident principal. In the *Pennoyer* case, Mr. Justice Field said further: 'Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts. * * *'

Appellants rely on the case of *Flexner v. Farson, et al.*, 248 U. S. 289. This was an action brought in Illinois by the plaintiff in error upon a judgment for money rendered by a court in Kentucky. Defendants were doing business in the latter State as partners through Flexner. The defendant Farson was the only one served with a process, and he pleaded that the defendants in the former suit did not reside in Kentucky, were not served with process and did not appear, and

that Flexner was not their agent at the time of service upon him, that the Kentucky statute relied upon was unconstitutional, and that the Kentucky court had no jurisdiction and, therefore, its judgment was void. The plaintiff demurred to the pleas and stood upon his demurrer when it was overruled, whereupon judgment was entered for the defendants. The judgment of the court below was affirmed by the United States Supreme Court in an opinion by Mr. Justice Holmes, who stated: 'It is said that the defendants by doing business in the State consented to be bound by the service prescribed. The analogy of suits against insurance companies based upon such service is invoked. *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147. But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition letting them in. * * * The State had no power to exclude the defendants and on that ground without going farther the Supreme Court of Illinois rightly held that the analogy failed, and that the Kentucky judgment was void.' We do not think it was necessary for the determination of the question of validity of service for the court in that case to decide that the Kentucky act was unconstitutional, because the plaintiff in demurring to the pleas, admitted that Flexner was not defendants' agent at the time service was made upon him. This alone rendered the service invalid and the judgment a nullity. Secondly, we believe the decision has been in effect overruled in *Hess v. Pawloski*, 274 U. S. 352. Thirdly, the decision in the *Flexner* case did not create a rule of property on which vested interests have since been based; it affected only rules of procedure and therefore, if public policy * requires its reversal, the resulting good has in it no alloy of harm.

'The eminent jurist who wrote the opinion in the *Flexner v. Farson* case said in his address, 'The Path of the Law', Harvard Law Review, Vol. X, 457: 'The language of Judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainly generally is illusion, and

repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.'

Appellate courts expressly overrule or modify their former decisions when justice requires it. See *Farmers Loan & Trust Co. v. Minnesota,* 280 U. S. 204; *Hall v. D. L. & W. R. R. Co.,* 270 Pa. 468; 113 A. 669; *Lonergan's Est.,* 303 Pa. 142, 148, 154 A. 387.

Our affirmation of the judgment of the court below is based upon the fact indicated by the evidence and found by the court that 'the cause of action arose out of a transaction of their (i. e. defendants) business in Allegheny County.' This decision is without prejudice to the defendants to renew their attack on the service should later proceedings show the cause of action did not so arise.

Our conclusions are:

First, that the statutes attacked do not abridge the privileges or immunities of citizens of the United States. A citizen of another State has no cause to complain when Pennsylvania imposes the conditions it has imposed on his doing business here, and which are precisely like those imposed on its own citizens. If a resident of another part of Pennsylvania maintained an office and agent in Allegheny County, he could be sued in that county in actions *in personam* and he

would have to respond to the process served on his agent, and defend a suit in that county though it might be hundreds of miles from his place of residence. A non-resident of Allegheny County who happens to reside, for example, in New York State has no more cause to complain of this statute than has a non-resident of Allegheny County who may reside in eastern Pennsylvania only a short distance from the New York State line.

Secondly, that appellants' claim of denial of due process of law is not well founded. In *Simon v. Craft,* 182 U. S. 427, 436, the Supreme Court of the United States in an opinion by Mr. Justice White said: 'The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things and not by mere form.' In *Wuchter v. Pizzutti, supra,* (276 U. S. 13), the Supreme Court of the United States in an opinion by Mr. Chief Justice Taft, after discussing several cases involving the question of due service of process, said: 'These cases and others indicate a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice, and that is the principle that we think should apply here.'

If, as in *Hess v. Pawloski, supra,* (274 U. S. 352), a service of Massachusetts judicial process can be obtained upon a resident of Pennsylvania in an action for damages arising from an automobile collision in Massachusetts between his car and another car, by serving an official of Massachusetts, without violating the due process of law command of the Federal Constitution, we see no reason why a writ issuing out of the Court of Common Pleas of Allegheny County, Pennsylvania, on a cause of action arising in this Commonwealth cannot be served upon residents of New York State by serving their designated agent residing in and doing business for them within the jurisdiction of that court.

The judgment is affirmed."

The rationale of the principle laid down in the cases involving foreign corporations and also the cases involving non-resident natural persons is the same; namely, that the corporation or the natural person desiring to do something which the state may lawfully prohibit or regulate, the state may permit the doing of that act on condition that the person who does do the act in question shall thereby be deemed to have agreed that some designated person shall be his agent on whom notice of suit against the principal may be served. In the case of a foreign corporation it is the power to exclude, and having the power to exclude, the state may as a condition precedent to permitting the foreign corporation to enter the state, impose the requirement that the corporation appoint a process agent within the state. In the case of a non-resident natural person it is the power of the state to regulate the doing of certain acts within its boundaries and, in the exercise of that power, to forbid the doing of those acts unless the persons doing them are willing to submit to such regulations as are reasonably necessary for the protection of the public.

If it be conceded that the State of Iowa had a right to regulate the doing of business by and through an agent by providing that in actions arising out of that agency notice might be served upon the principal by serving the agent, then this case is ruled by *Hess v. Pawloski.* If Massachusetts could say that the driving of a motor vehicle upon the highways of the state was the equivalent of the appointment of an agent upon whom process might be served in cases growing out of the operation of said motor vehicle, then Iowa could say that in cases growing out of an agency that your agent is clothed with authority to bind you by process served upon him.

The contention is made that Doherty was never physically within the State of Iowa and, therefore, Iowa could not have jurisdiction over him. We submit that that fact

is immaterial because Doherty's agent was here by his express direction and order. He was the motivating force. His agent was his *alter ego* in Iowa. The Supreme Judicial Court of Massachusetts in *Pawloski v. Hess* in the case reported in 149 N. E. 122 did not conceive that it made any difference whether Hess was in Massachusetts personally or by an agent. In that opinion appears the following:

> "This is an action of tort brought to recover compensation for personal injuries received by the plaintiff through being struck by an automobile owned by the defendant and operated by him or by someone for whose acts he was responsible."

In *Potti v. New England Road Machinery Company*, 140 Atl. 587 it appeared that an agent of the defendant was responsible for the injuries on account of his operation of a motor vehicle on the highways of New Hampshire. It does not appear that the corporation had been qualified to do business in New Hampshire. The Supreme Court of New Hampshire stated:

> "The law under which service was made provides, in substance, that a non-resident's operation of a motor vehicle on any highway within the state shall be deemed equivalent to the appointment of the commissioner of motor vehicles as his agent, upon whom may be served process in any action arising out of any accident in which he may be involved while thus operating his motor vehicle, and that such operation signifies his agreement that such process so served shall amount to personal service on him within the state, provided the commissioner mails him notice of it.
>
> The law is practically identical with one in Massachusetts, which has been held constitutional both in that state and by the United States Supreme Court. *Pawloski v. Hess*, 250 Mass. 22, 144 N. E. 760, 35 A. L. R. 945; *id.*, 253 Mass. 478, 149 N. E. 122; *id.*, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091. No point is made that any constitutional question in any particular not

considered in that case is here raised, and its authority is affirmed.

The suggestion that the law requires the acceptance of an impossible condition as an actual one, because the non-resident's appointment of the commissioner as his agent is contrary to the fact, and that the law thus creates a relation when none exists fails to recognize the voluntary entrance of the non-resident on our highways as his act accepting its legal consequences, whatever they may be. The statute does not declare the commissioner's authority as given in terms by the non-resident, but describes the appointment as the equivalent in significance of express authority from the non-resident. It is made a condition of a non-resident's use of our highways with a motor vehicle that he may not be heard to deny the commissioner's authority, and the statute creates no relation contrary to the fact, but merely bars disproof of it.

In a broader way, the constitutional issue being met, any methods of service prescribed by the Legislature are valid, and do not depend upon the defendant's consent to it, whether he be resident or non-resident. And the phraseology of the legislation in describing the commissioner as the defendant's agent is not of importance."

In *Stoner vs. Higginson, Supra,* it does not appear that the individual defendants were in the State of Pennsylvania. If the presence of Doherty in the State of Iowa is at all material, it certainly must be limited to being in the State of Iowa at the time of service. Upon the theory of jurisdiction based upon physical power only, certainly no one would contend that presence in the State at a time other than the beginning of the action is material. *McDonald v. Mabee,* 243 U. S. 90. So in the case at bar Appellee is not contending for jurisdiction on the basis of physical power, but is asserting that jurisdiction is conferred on the basis of express and implied consent and obligation. It is clear that if Doherty had given his agent express con-

sent to be served with process that service upon the agent would give jurisdiction.

Contention has been made that the corporation cases are not relevant because the corporation is not a citizen. Therefore, a foreign corporation may be excluded arbitrarily by a state and a state having absolute power can attach any condition it desires to the corporation's doing business in the State. However, this theory of jurisdiction over the corporation breaks down in the face of *International Harvester Company v. Kentucky*, 234 U. S. 579. In that case the corporation was engaged solely in interstate commerce and the State had no power to prevent it from carrying on its business. Nevertheless, this court held that the corporation was amenable to judicial process within the State. Likewise as to an individual it was thought that until the decision in *Hess v. Pawloski* that an individual had an absolute right to go in and through a State without being amenable to the judicial process unless served within the State. Both of these cases sustain appellee's contention that Doherty by sending his agent into the State and doing business in Iowa impliedly assented to be bound by the laws of the State of Iowa providing for service of process upon the agent.

Charles Kellogg Burdick in 20 Michigan Law Review 424 in commenting upon *Flexner v. Farson*, 248 U. S. 289 says:

> "Yet we have seen that a reasonable regulation as to service of process upon a foreign corporation entering to engage in interstate commerce may be imposed, though the corporation cannot be excluded from the State. Similarly a regulation as to natural persons entering to do business within the State, providing for service of process upon an agent in the State where a cause of action arises within the State, would seem not to deny such persons any privilege or immunity of citizens of the State, but rather to put them on an equal footing with such citizens."

In *Pennoyer v. Neff*, 95 U. S. 714, Mr. Justice Field took pains to make clear that the decision of the court in that case did not prevent the several states from requiring non-residents under certain circumstances to appoint a process agent within the State. This portion of the opinion is quoted by the court in *Stoner v. Higginson, Supra.*

See further cases sustaining statutes similar to Section 11079 of the Code of Iowa:

Edwards v. Van Cleve (Ind.) 94 N. E. 596.

Davidson v. Doherty, 214 Iowa, 739.

Austin W. Scott in 32 Harvard Law Review, 871, at 888 states:

> "But there would seem to be no objection to a statute which forbids non-residents to do business within the state without having consented to the jurisdiction of the courts of the state as to all causes of action arising within the state and out of the business carried on within the state. Such a provision seems essentially just. Very clearly provisions allowing creditors to attach the assets employed in the business within the state are desirable and proper, and such provisions are well-nigh universal; but very frequently the business is carried on without the use of any property within the state. In such a case should a creditor of the business be bound to resort to other states to search out and discover the owner of the business? That would seem to be a hardship to the creditor. The words of Mr. Justice Swayne, speaking of the unfairness of refusing a creditor the right to sue a foreign corporation in the State where the corporation was carrying on business and where the cause of action arose, are equally applicable here. 'In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility.' On the other hand there is little hardship on the owner of the business if he is required to answer for all claims arising out of the

business in the place where the business is carried on. A statute requiring persons carrying on business within the state to consent to service of process upon an agent in actions arising within the state out of the business carried on within the state, would therefore seem to fall within the proper scope of the police power.

If a state has power to forbid a non-resident to do business without having filed a consent to service of process upon his agent, the question arises whether the state has jurisdiction in the absence of such express consent. We have seen that in the case of corporations, on one or the other of three possible theories, the Supreme Court has held that the state may acquire jurisdiction over foreign corporations doing business within the state, as to causes of action therein arising, although no consent was expressly given. How far are these three theories applicable to the case of non-resident individuals? It seems impossible to say that the non-resident is present and 'found' within the state; an individual cannot be present except where his physical body is. But it would seem that it is as easy to apply the doctrine of 'implied' consent to an individual non-resident, as to a foreign corporation. If the mere fact that a corporation does business in a state constitutes a consent to the conditions which the state may properly and does impose, it is hard to see why the doing of business by an individual is not a consent to the conditions which the state may properly and does impose. The mere fact that the state may not properly impose conditions upon individuals which it may impose upon corporations is immaterial, as long as the conditions it does impose are proper. Furthermore, if according to Judge Hand's theory, a corporation is bound by conditions imposed by the state, not because it has consented to be bound, but because by voluntarily doing business within the state it is just and proper to hold that it is bound by the reasonable regulations of that business by the state, there is no good reason why an individual should not likewise be bound."

2. Appellant accepted the benefits conferred by the Laws of the State of Iowa and thereby obligated himself to the jurisdiction and restrictions of that law.

F. Arnold Daum in 19 Iowa Law Review, Page 431 states:

> "the real basis of jurisdiction is not physical power over the defendant but it is the obligation to respect the judgment of the court which the defendant owes to the sovereign state because of the relationship existing between them. This obligation exists by reason of the defendant's act in accepting the benefits conferred by the sovereign state, and it is because of this that it is his duty to obey the judgment given by the court of such state—this, and not physical power, in its true sense, is the foundation of the jurisdiction of the court. This theory of jurisdiction is probably only the rationalization of that which the courts have been doing for some time, but it is submitted that it would be better to cease talking in terms of a power, which it has been shown does not actually exist and is at best only a fiction, and talk in terms of reality—that is, the duty or the obligation of the defendant to obey the judgment. Physical power over the defendant is now only one part of our broadening concept of jurisdiction."

In the American Law Institute's Restatement of Conflict of Laws Section 90 appears the following:

> "A state can exercise through its courts jurisdiction over an individual who has done an act or caused an event within the state, as to a cause of action arising out of such act or event, if by the law of the state at the time when the act was done a person by doing the act or causing the event subjects himself to the jurisdiction of the state as to such cause of action."

It is Appellee's contention that the doing of an act within the State by an agent imposes certain legal consequences which in this case were that process against the principal might be served upon the agent. Judge Learned Hand in

Smolik v. Philadelphia & Reading Coal & Iron Company, 222 Fed. 148 rationalizes this doctrine as being based upon the necessities of the case and in the interest of justice. He says:

> "When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court, for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the State, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.
>
> The limits of that consent are as independent of any actual intent as the consent itself. Being a mere creature of justice it will have such consent only as justice requires; hence it may be limited, as it has been limited in *Simon v. Southern Railway, supra*, and *Old Wayne Insurance Co. v. McDonough, supra*. The actual consent in the cases at bar has no such latitudinarian possibilities; it must be measured by the proper meaning to be attributed to the words used, and, where that meaning calls for wide application, such must be given."

This same doctrine was applied to a non-resident individual in the case of *Gesell v. Wells*, 240 N. Y. Sup. 628 (229 App. Div. 11) affirmed in 254 N. Y. 604, 173 N. E. 885. There a non-resident minor was served with notice under a New York statute in substance the same as the Massachusetts statute applied in *Hess v. Pawloski*. The contention was made that the implied agreement on the part of the minor was either void or voidable at his election and that such agreement, if any, had been repudiated by him. This contention was rejected and the Court said:

"We agree with the learned court below that the statute in question makes no distinction between a minor and an adult in respect to its operation. It operates to require any non-resident to answer for his conduct in the state to the extent of declaring that the use of our public highways by the nonresident is the equivalent of the appointment of the Secretary of State as agent on whom a summons may be served. It is an exercise of the police power of the state, reasonably calculated to promote care and accountability on the part of all who use its highways for the operation of dangerous machines such as are motor vehicles. *Hess v. Pawloski*, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091; *Pawloski v. Hess*, 250 Mass. 22, 144 N. E. 760, 35 A. L. R. 945, *Id.*, 253 Mass. 478, 153 N. E. 478. Surely they are not less dangerous in the hands of minors. It is inconceivable that there should have been any legislative intent to exclude minors. But it is urged that the statute in question is based upon an implied agreement which, in the case of an infant, may be repudiated at his election. It would be strange if a police regulation of the state could be thus evaded.

The language of Section 285-a of the Highway Law (added by Laws 1928, c. 465), so far as material, is as follows: 'The operation by a nonresident of a motor vehicle on a public highway in this state shall be deemed equivalent to an appointment by such non-resident of the Secretary of State to be his true and lawful attorney upon whom may be served the summons in any action against him, growing out of any accident or collision in which such nonresident may be involved while operating a motor vehicle on such a public highway; and such operation shall be deemed a signification of his agreement that any such summons against him which is so served shall be of the same legal force and validity as if served on him personally within the state. * * *"

The constitutionality of the statute has been well settled. *O'Tier v. Sell*, 252 N. Y. 400, 169 N. E. 624; *Hess v. Pawloski*, 274 U. S. 352, 353, 47 S. Ct. 632, 633, 71 L. Ed. 1091. A substantially identical statute in Massachusetts was considered in *Hess v. Pawloski, supra*, wherein the United States Supreme Court said: 'And, in advance of the operation of a motor vehicle on its highway by a non-resident, the state may require him to appoint one

of its officials as his agent on whom process may be served in proceedings growing out of such use. *Kane v. New Jersey*, 242 U. S. 160, 167, 37 S. Ct. 30, 61 L. Ed. 222. That case recognizes power of the state to exclude a non-resident until the formal appointment is made. And, having the power so to exclude, the State may declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served.' If it is a 'constructive contract,' it is one which is absolutely binding by operation of a law passed in the exercise of the state's police power, and 'obligations and rights under the statute are not elective. They rest upon the command of the state, and not upon agreement of the parties.' *Matter of Cameron v. Ellis Construction Co.*, 252 N. Y. 394, 396, 169 N. E. 622, 623; *Smith v. Heine Safety Boiler Co.*, 224 N. Y. 9, 11, 119 N. E. 878, Ann. Cas. 1918D, 316. It is more than a 'constructive contract.' It is not contractual in a strict sense; it is an obligation imposed by the sovereign power of the state upon the act of coming into the state and using the state's highway. The obligation then becomes complete and binding because the statute so declares it. Its command and obligation cannot be evaded, disaffirmed, or repudiated because of infancy. 'When the law clothes an intentional and intelligent act with specified consequences, then the doing of that act commonly entails those consequences.' *Pawloski v. Hess*, 250 Mass. 22, 27, 144 N. E. 760, 35 A. L. R. 945. Any nonresident infant old enough to operate a motor vehicle is presumably capable of the 'intentional and intelligent act' of voluntary acceptance of the benefit of using our highways upon the condition named in the statute. He comes fairly within the scope of a statute affording a convenient method of obtaining a personal judgment against all, residents and nonresidents alike, who use our highways; and the provision of the statute is all inclusive.

The doctrine laid down in *Young v. Masci*, 289 U. S. 253, 77 Law Edition 1158 imposes the obligations of the law of the State of New York upon a New Jersey resident who permitted a New Jersey resident under a contract of bailment

made in New Jersey to drive the defendant's car into the State of New York. In that case this court said:

> "He challenges the statute only as applied to a non-resident owner who made the bailment outside the State of New York and who was not within it at the time of the accident.
>
> * * * * *
>
> Thus the essential question is the power of New York to make the absent owner liable personally for the injury inflicted within the State by his machine.
>
> When Young gave permission to drive his car to New York, he subjected himself to the legal consequences imposed by that State upon Balbino's negligent driving as fully as if he had stood in the relation of master to servant. A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument. The cases are many in which a person acting outside the State may be held responsible according to the law of the State for injurious consequences within it. Thus, liability is commonly imposed under such circumstances for homicide, *Com. v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89; for maintenance of a nuisance, *State v. Lord*, 16 N. H. 357, 359; for blasting operations. *Cameron v. Vandergriff*, 53 Ark. 381, 386, 13 S. W. 1092; and for negligent manufacture. *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440, 13 N. C. C. A. 1029.
>
> The power of the State to protect itself and its inhabitants is not limited by the scope of the doctrine of principal and agent."

In *York v. Texas*, 137 U. S. 15, 34 Law Ed. 604 the State of Texas provided that an appearance for the purpose of pleading to the jurisdiction was a voluntary appearance which brought the defendant into court. The defendant served out of the State contended that this statute deprived

him of liberty or property without due process of law. The defendant entered a special appearance by his counsel challenging the jurisdiction of the court. This was overruled and judgment was rendered against him.

This court affirmed the Texas judgment and held that the provisions of the Texas statute did not violate the 14th Amendment to the Constitution.

There it appears that the defendant sent his attorney, in fact his agent, into the State of Texas for the purpose of contesting the jurisdiction. The defendant did not admit that the State of Texas had jurisdiction over him, nor did he intend to give the State of Texas jurisdiction over him by sending his agent into the State to plead for him. Neither did he consent to the jurisdiction of the State of Texas. However, the law attached certain consequences to the defendant's acts and if he did the act the results followed.

We submit that on the analogy of *Young v. Masci* and *York v. Texas,* that when the appellant sent his agent into the State of Iowa and did business through that agent, that the consequences of that act were that the law of Iowa made that agent the defendant's process agent for the purpose of actions growing out of that agency.

Maurice S. Culp in 32 Michigan Law Review 909 at 922 states:

> "The due protection of the business and economic interest of residents seems to warrant the acquisition of some measure of control over the activities of non-residents just as the policy of protecting local residents favored the authorization of service of process upon non-resident motorists in causes of action growing out of accidents within the State. The inability to secure redress in the local courts against non-resident business men is a considerable hardship upon residents; it affects a class of residents quite as large and important as the class affected by contact with non-resident motorists. There is certainly no less practical reason for allowing substituted service on the non-resident broker

in a suit for fraud practiced by his agent than for allowing such service in a suit against a non-resident motorist for personal injuries."

In *Davidson v. Doherty*, 214 Iowa 739 at 750 the Court says:

"What difference is there, under the due process clause of the Federal Constitution, between an action for damages for personal injury and an action for damages for fraud in the sale of stock? Both are strictly actions *in personam* and arise at common law. If jurisdiction can be obtained in one by substituted service on an agent, certainly it can be in the other. If such service is due process of law in one instance it can not be anything else in the other. There is no question of police power in either case. It is strictly and solely a question of 'due process of law.'"

In *Alaska Commercial Co. v. Debeny*, 144 Fed. 1 judgment had been obtained in Canada against the defendant by service upon the defendant's agent located in Canada at a time when the defendant was not in Canada, had no residence there and did not intend to return there. The applicable Canadian statute provided as follows:

"(14) Service of writ of summons shall be effected by copy, as follows: (1) By personal service anywhere in the territories; (2) in case any defendant is out of the territories, but has an agent, managing clerk, or other representative resident and carrying on his business within the same, service of the writ of summons may be made on such agent, managing clerk, or other representative. * * *"

A suit was brought in the District Court of the United States upon the Canadian judgment. The District Court held the judgment void. Upon appeal the Circuit Court of the 9th Circuit held the judgment valid and said:

"We think it clear that the evidence shows, without any substantial conflict, that A. W. Debeny was the defendant's agent and legal representative, within the meaning of the provision of the Canadian statute in question, and that the service upon him in the action there brought was a valid service, and, accordingly, that the judgment there rendered was a valid judgment. It results that the judgment of the court below must be reversed, without reference to the other questions discussed by counsel."

The Court does not precisely indicate whether the judgment was held valid upon the basis of implied consent or upon the basis of obligation, but it is fair to say that the theory in the mind of the Court from the preliminary discussion is that the judgment was valid on the theory of obligation.

We, therefore, submit that Section 11079 of the Code of Iowa being in full force and effect when Appellant sent his agent into the State of Iowa and when said agent was served that on the basis of duty and obligation to the sovereign state of Iowa growing out of the protection that the laws of the State of Iowa afforded to the defendant's business that the Appellant is bound by the service of notice upon his agent and the judgment rendered against him is valid.

3. Appellant expressly consented to the jurisdiction of the Courts of Iowa in that the law of Iowa was read into the contract of employment and conferred upon the agent the power and authority of a process agent of Appellant.

Nothing appears in the record as to the place where the contract between Doherty and King was executed. However, the place of performance was in the State of Iowa and doubtless the contract contemplated performance in the State of Iowa. At the time of the entering into of the contract and of the performance thereof Section 11079 of the Code of Iowa was the law of this State. We, therefore, assert that that section was written into the contract and con-

ferred upon the agent the power and authority of a process agent for the Appellant and imposed upon him the duties and obligations to be served with notice of suit to the extent permitted in said section.

In *Pinney v. Nelson*, 183 U. S. 144; 46 Law Ed. 125 the stockholders of a Colorado corporation who, under the laws of Colorado, had no liabilities to the creditors of the corporation were made liable under a California statute which provided that liability would be imposed upon stockholders for the benefit of creditors. The Court quoted from *Pritchard v. Norton* as follows:

> "The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation.
>
> * * * * *
>
> "Now when they in terms specified that they were framing a corporation for the purpose of having that corporation do business in California, is it not clear that they were contracting with reference to the laws of that state? Contracting with reference to the laws of that state they must be assumed to know the provisions of those laws; that by them a personal liability was cast upon the stockholders in corporations formed under the laws of the state, and that that same liability was also imposed upon the stockholders of corporations formed under the laws of other states and doing business within California. How can it be said that those laws do not enter into the contract and control as to all business done in pursuance of that contract within the limits of California. Suppose these same stockholders in Colorado had formed a partnership with the expressed intent of carrying on business in California, would not that expressed intent be a clear reference to the laws of California and in incorporation of those laws into the liabilities created by the partnership business in California? And if this rule obtains as to contracts of partners between themselves, why not also as to contracts

of stockholders between themselves in forming a corporation?

* * * * *

All that we here hold is that when a corporation is formed in one state, and by the express terms of its charter it is created for doing business in another state, and business is done in that state, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business."

In *Lafayette Ins. Company v. French*, 18 How. 404, 15 Law Ed. 451 the Court said:

"Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the Corporation must be taken to assent to the condition upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the Corporation to receive service of process in suits on such contracts, and, in legal contemplation, the appointment of such an agent clothed him with power to receive notice, for and on behalf of the Corporation, as effectually as if he were designated in the charter as the officer on whom process was to be served; or, as if he had received from the president and directors a power of attorney to that effect. The process was served within the limits and jurisdiction of Ohio, upon a person qualified by law to represent the Corporation there in respect to such service; and notice to him was notice to the Corporation which he there represented, and for whom he was empowered to take notice.

In *Bagdon v. Philadelphia & Reading Coal & Iron Company*, 217 N. Y. 432, 111 N. E. 1075 the defendant, a Pennsylvania corporation, appointed a process agent in the State of New York. The plaintiff having a cause of action which arose in Pennsylvania began an action in New York and served its process upon the New York agent. The defend-

ant contended that as the cause of action had no relation to business transacted in New York that the service upon the New York process agent was unavailing as the appointment was only made at the instance of the State of New York so that service could be made upon it on account of actions arising out of New York business. The court held that the service was good and said:

> "The stipulation is therefore a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent. He is made the person 'upon whom process against the corporation may be served'. The actions in which he is to represent the corporation are not limited. The meaning must, therefore, be that the appointment is for any action which, under the laws of this state, may be brought against a foreign corporation. The contract deals with the jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject matter. It means that whenever jurisdiction of the subject matter is present service on the agent shall give jurisdiction to the person. * * * The statute makes no provision for service on a public officer if a designation is not filed; the corporation may withhold its stipulation and carry on business legally; all that it forfeits is the right to enforce its contracts in our courts. In return for that privilege it has made a voluntary appointment of an agent selected by itself. We are not imposing or implying a legal duty. We are construing a contract."

In dealing with the same problem on a similar state of facts was dealt with by Judge Learned Hand and a like conclusion was reached in *Smolik v. Philadelphia & Reading Coal & Iron Company*, 222 Fed. 148. The Court there said:

> "The defendant here argues that the terms of such an implied consent cannot be supposed to be other than those which the state statute attempts to exact, and that if the implied consent is to be limited, as has now been indubitably done, the express consent must be limited in exactly the same way. Were this not true, the de-

fendant urges, an outlaw who refused to obey the laws of the state would be in better position than a corporation which chooses to conform. The theory of implied consent dialectically requires the same limitations to be imposed upon express consents, at least in the absence of some explicit language to the contrary in the state statute.

The plaintiffs, on the other hand, urge that the express consent of a foreign corporation to the service of process upon its agent (Section 16, General Corporation Law; Section 432, Code of Civil Procedure) must be interpreted in the light of the statutes of the state, giving jurisdiction to its own courts, and that in the cases at bar residents of New York may, under the New York Code, Section 1780, sue foreign corporations upon any cause of action whatever. While, of course, the jurisdiction of this court over the subject-matter of suits depends altogether upon federal statutes, the question now is of personal jurisdiction, and that depends upon the interpretation of the consent actually given, an interpretation determined altogether by the intent of the state statutes. That intent being determined, there is no constitutional objection to a state's exacting a consent from foreign corporations to any jurisdiction which it may please, as a condition of doing business. Intent and power uniting in the sections in question, how is it possible to confine the provision to actions arising from business done within the state?"

Assuming that Appellee is correct in his contention argued in Division I; namely, that it was within the power of the State of Iowa to enact Section 11079, then Appellee submits that the contract between Doherty and his agent King conferred upon King the power and authority to be the process agent of Doherty and thus express consent was given by Doherty to submit causes growing out of the agency in Iowa to the Iowa courts.

ANSWER TO ARGUMENT OF APPELLANT.

I.

Appellee concedes that one of the bases of jurisdiction to render judgment against an individual is power. On the other hand, we assert that jurisdiction may be conferred by consent implied or expressed and by duty and obligation. These are argued in Division III above. Appellant says that the extension of a sovereign's jurisdiction beyond its boundaries is war. Pennsylvania did not war on Massachusetts on account of the decision of *Hess v. Pawloski* nor did New York war on New Jersey on account of the decision in *Kane v. New Jersey*. On the other hand, Kentucky did not march on Illinois because of the decision in *Flexner v. Farson*.

We submit that in this day of far flung economic and industrial enterprises, where a citizen of New York may by virtue of Section 2 of Article IV of the Federal Constitution send his agents into the forty-eight states of the Union and transact his business in each of them, that it is necessary that each of the states be permitted to regulate and restrict those agents on the same basis as they restrict their own citizens, at least to the extent set forth in Section 11079 of the Code of Iowa.

This is one nation. Each of the states is restricted to the extent set forth in Section 2 of Article IV of the Constitution and in the 14th Amendment thereto. Thereby a Federal right was given to the citizens of each State to enter into any other State and engage in business with the same rights and privileges accorded to the citizens of that State. The purpose of the privileges and immunities clause was to prevent discrimination between the citizens of the several states. To hold that a citizen of New York may have more privileges and immunities in the State of Iowa than a citizen of Iowa is to discriminate against the citi-

zen of Iowa and thus reach a result contrary to the purpose of Section 2 of Article IV of the Constitution. Thus will be promoted friction between the states and dissension within the union.

II.

Appellant depends upon a quotation from Story Conflict of Laws Paragraph 539. The quotation is sound so far as it goes, but since Mr. Justice Story wrote these words this court has decided *Hess v. Pawloski*, *Kane v. New Jersey* and *Blackmer v. United States*. Neither the text of Story nor the act of the Iowa Legislature must fall. *Pennoyer v. Neff* is cited. Mr. Justice Field in that case expressly excluded the situation which we have in the case at bar and in the case of *Hess v. Pawloski*. Assertion is made that the corporation cases are not relevant, but we believe that that is not sound. See Appellee's Division III above. Assertion is made that Massachusetts had the right to exclude Hess from its highways. We do not believe that that is the law. We assert that the limit of Massachusetts' rights was to regulate the use of its highways and to put Hess on a basis of substantial equality with its own citizens.

We concede that *McDonald v. Mabee* and *Michigan Trust Company v. Ferry* are correctly decided, but the language used therein can only apply to the situations before the Court. In the *Ferry* case it is evident that the State could not have enforced its mandates on Ferry at the time the decree was issued. Its execution would not run into other states. We do not believe that the fact that Doherty was never in Iowa is conclusive against Appellee.

York was not in Texas, Higginson was not in Pennsylvania and the New England Road Machinery Company was not in New Hampshire. King, Doherty's *alter ego*, was in Iowa. So long as it is not claimed that the judgment depends upon physical power rather than upon consent and

obligation, Doherty's physical presence is immaterial. The assertion is made that Doherty never used anything of Iowa's—never used anything in Iowa. This we deny. The validity of his contracts, the safety of his agents and the protection of any property he might have had in Iowa, regardless of the amount or extent thereof, were established and protected by the laws of Iowa. Certainly Appellant would not contend that Doherty's agents in Iowa were outlaws and that Doherty had no rights that he could enforce in the Courts of Iowa.

Flexner v. Farson is cited. We concede that the language in this case sustains Appellant's contentions. However, since the decision in *Flexner v. Farson, Hess v. Pawloski* has been decided. The language in *Flexner v. Farson* would not have permitted the conclusion reached in *Hess v. Pawloski.* Further, *Flexner v. Farson* is distinguishable upon the facts.

1. The agent was not in the service of the defendants at the time process was served upon him.

2. The Kentucky statute applied only to non-residents and, therefore, was discriminatory and stricken down by Section 2 of Article IV of the Constitution and the 14th Amendment to the Constitution.

3. Kentucky required a personal service upon residents. Iowa permits a substituted service upon residents. Section 3518 Code of 1897.

4. The Kentucky statute made no distinction between causes of action arising within the state and causes of action arising elsewhere. Under the rule laid down in *Old Wayne Life Assoc. v. McDonough,* 204 U. S. 8 and *Simon v. Southern Railway Company,* 236 U. S. 115 this was sufficient to strike down the statute.

See Austin W. Scott "Jurisdiction over non-residents doing business within a State" 32 Harvard Law Review 889. See Culp Process and Actions against non-residents doing

business within the State, 32 Michigan Law Review at 918.

The same reasoning as distinguishes *Flexner v. Farson* also distinguishes *Brooks v. Dun, Mordock v. Kirby* and *Ralya Market Company v. Armour & Company.* Further the Court in *Ralya Market Company v. Armour & Company* held the service good against the co-partnership, thus being in accord with *Sugg v. Thornton,* 132 U. S. 524, 33 Law Ed. 447. *New York Life Ins. Company v. Dunlavey* has no application to the case at bar. Mrs. Dunlavey did not have an agent in Pennsylvania upon whom service might be made. See *Stoner v. Higginson, Supra.*

We submit that the decision of the Supreme Court of Iowa is correct and should be affirmed.

We further pray the Court that in case of affirmance that it hold open its judgment for taxation of attorneys' fees in such amount as is reasonable in accordance with the provisions of Section 8581 C-18 of the Code of Iowa 1927.

Respectfully submitted,

JOSEPH I. BRODY,
CLYDE B. CHARLTON,
Attorneys for Frank Goodman, Appellee.

GEORGE E. BRAMMER,
LOUIS A. PARKER,
of Counsel.

APPENDIX.

Code of Iowa, 1927 Section 8581 c-18:

"Remedies. Every sale or contract for sale made in violation of any of the provisions of this chapter shall be voidable at the election of the purchaser and the person making such sale or contract for sale and every director, officer or agent of or for such seller who shall have personally participated in making such sales and at the time knew of such violations shall be jointly and severally liable to such purchaser in an action at law in any court of competent jurisdiction upon tender to the seller in person or in open court of the securities sold or of the contract made for the full amount paid by such purchaser, together with all taxable court costs and reasonable attorneys' fees in any action or tender under this section;"

20

SUPREME COURT OF THE UNITED STATES.

No. 469.—October Term, 1934.

Henry L. Doherty & Company, Appellant, vs. Frank Goodman, Appellee. } Appeal from the Supreme Court of the State of Iowa.

[April 1, 1935.]

Mr. Justice McReynolds delivered the opinion of the Court.

In 1926 Henry L. Doherty, citizen of New York, trading as Henry L. Doherty & Company, established an office at Des Moines, Polk County, Iowa, and there through agents carried on the business of selling corporate securities throughout the State. E. A. King, designated as District Manager, took charge of this office in January, 1929, and continued to direct its affairs during the time here important. Under him were clerks and stock salesmen, paid directly from New York.

A salesman operating from the Des Moines office, September 1, 1929, negotiated in that city a sale of stock to appellee Goodman, and out of this the present controversy arose. The only power or authority expressly conferred upon King by Doherty was to sell securities and supervise other employees; he never in terms consented that service of process upon this agent should constitute service upon himself.

Sec. 11079, Iowa Code 1927, also 1931, in effect since 1851 provides:

> "When a corporation, company, or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency".

July 31, 1931, appellee Goodman commenced an action against Doherty in the District Court, Polk County, wherein he sought only a personal judgment for damages arising out of the sale contract of September 1, 1929. The usual summons or notice com-

manding the defendant to appear was served upon District Manager King.

Doherty appeared specially. He challenged the jurisdiction of the court; claimed he had not been within the State; King had no authority to accept service of process in his behalf; the alleged service was ineffective; and that to hold otherwise would deprive him of rights guaranteed by the Federal Constitution. The District Court, relying upon Code Section 11079, overruled the special plea and held the service adequate. Doherty made no further appearance. Judgment against him was affirmed by the Supreme Court.

The cause is here by appeal. Appellant insists that if construed as applicable to him, a citizen of another state never in Iowa, in the circumstances disclosed by the record Sec. 11079 offends the Federal Constitution, Sec. 2, Art. 4, and Sec. 1, 14th Amendment.

The Supreme Court affirmed the action of the trial court upon authority of *Davidson* v. *H. L. Doherty & Co.*, (1932), 214 Iowa 739. The opinion in that cause construed Sec. 11079 and among other things said:—

> "By its terms, and under our holding, the statute is applicable to residents of 'any other county' than that in which the principal resides, whether such county be situated in Iowa or in some other state. In other words, the statute does apply to non-residents of Iowa who come within its terms and provisions, as well as to residents. Our construction of the statute has stood since 1887. . . . We adhere to our former holdings that the statute is applicable to individual non-residents who come within its express terms and provisions. . . .
>
> "The statute in question does not in any manner abridge the privileges or immunities of citizens of the several states. It treats residents of Iowa exactly as it treats residents of all other states. The citizens of each state of the United States are, under this statute, entitled to all the privileges and immunities accorded citizens of this state.
>
> "The justice of such a statute is obvious. It places no greater or different burden upon the non-resident than upon the resident of this state.. . . . A non-resident who gets all the benefit of the protection of the laws of this state with regard to the office or agency and the business so transacted

ought to be amenable to the laws of the state as to transactions growing out of such business upon the same basis and conditions as govern residents of this state. . . . It makes no hostile discrimination against non-residents, but tends to put them on the same footing as resident. . . .

"Four things are, under this statute, essential to the validity of such service. 1. The defendant must have an office or agency in the county. 2. It must be a county other than that in which he resides. 3. The action must grow out of or be connected with the business of that office or agency. 4. The agent or clerk upon whom service is made must be employed in such office or agency. . . .

"When a non-resident defendant establishes an office or agency for the transaction of business in any county in this state under this statute, he thereby voluntarily appoints his own agent, in charge of said office or agency, as one upon whom substituted service in actions in personam, growing out of that office or agency, may be made. . . . Under our statute, the implied consent to be sued in this state is limited to proceedings growing out of the business transacted through the office or agency in this state. It is required that the agent shall act to receive a copy of the notice of suit and that it shall be read to him. . . . The action must grow out of the business of that very agency. Ample time is given the defendant to appear and defend; there is not only 'reasonable probability' but practical moral certainty that the defendant will receive actual notice of the pendency of the action."

Iowa treats the business of dealing in corporate securities as exceptional and subjects it to special regulation. Laws 1913, c. 137; Laws 1921, c. 189; Laws 1929, c. 10, approved Mar. 19, 1929. The last cited Act requires registration and written consent for service of process upon the Secretary of State. See *Merrick* v. *Halsey & Co.*, 242 U. S. 568. Doherty voluntarily established an office in Iowa and there carried on this business. Considering this fact, and accepting the construction given to Sec. 11079, we think to apply it as here proposed will not deprive him of any right guaranteed by the Federal Constitution.

Flexner v. *Farson*, 248 U. S. 289, much relied upon, does not sustain appellant's position. There the service was made upon one

not then agent for the defendants; here the situation is different. King was manager of the appellant's office when the sale contract was made; also when process was served upon him. Moreover, under the laws of Iowa, neither her citizens nor non-residents could freely engage in the business of selling securities.

The power of the states to impose terms upon non-residents, as to activities within their borders, recently has been much discussed. *Hess* v. *Pawloski*, 274 U. S. 352; *Wuchter* v. *Pizzutti*, 276 U. S. 13; *Young* v. *Masci*, 289 U. S. 253. Under these opinions it is established doctrine that a state may rightly direct that non-residents who operate automobiles on her highways shall be deemed to have appointed the Secretary of State as agent to accept service of process, provided there is some "provision making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued".

So far as it affects appellant, the questioned statute goes no farther than the principle approved by those opinions permits. Only rights claimed upon the present record are determined. The limitations of Section 11079 under different circumstances we do not consider.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.